2016

Office of Professional Conduct, Petitioner and Appellant v. Richard Lajeunesse, Respondent and Appellee

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Discipline of Richard M. LaJeunesse, Bar No. 7408	**APPEAL**
Office of Professional Conduct, Petitioner and Appellant v. Richard LaJeunesse, Respondent and Appellee.	Supreme Court No. 20160264-SC District Court No. 130905706

BRIEF OF APPELLEE

This is an Appeal from the Third Judicial District Court
Salt Lake Department, Salt Lake County, State of Utah
Judge Andrew Stone

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Const. Art. VIII, Sec. 4.

STATEMENT OF ISSUES

The Honorable Andrew Stone found Administrative Law Judge (ALJ) and Attorney Richard M. LaJeunesse's objectively reasonable positions, taken in good faith, were either legally permissible or at least did not violate express statute or policy and did not amount to conduct prejudicial to the administration of justice. Addendum, Ex. 1, *Concl.Law,*[1] ¶ 31, R. 1044. Relying in part on *In re Worthen*, 926 P.2d 853, 868-9, 878 (Utah 1996), the court rejected OPC's analysis that LaJeunesse's authorization and return of medical reports to medical panels without notice to parties caused delay and increased costs, because R. Prof. Conduct Rule 8.4(d) (Rule 8.4(d))[2] must require some daylight between reasonable interpretations of the law and ethical violations. *Concl.Law*, ¶¶ 23-30, R. 1041-4.

In light of these findings, the issue is whether OPC carried its burden to prove

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[1]*Concl.Law* refers to the court's conclusions of law. *Findings* refers to the court's Findings of Fact.

[2]The rule states: Rule 8.4. Misconduct. It is professional misconduct for a lawyer to (d) engage in conduct that is prejudicial to the administration of justice. Addendum Ex. 2.

these findings clearly erroneous, or show that the court's legal analysis was incorrect.

STANDARD OF REVIEW

This Court "presume[s] the district court's findings of fact to be correct 'unless they are arbitrary, capricious, or plainly in error,' [giving] less deference to the findings than it otherwise would, . . . 'reserv[ing] the right to draw inferences from basic facts which may differ from the inferences drawn' by the district court[,]" *Office of Professional Conduct v. Barrett*, 2017 UT 10, ¶ 11 (citations omitted); or unsupported. *Utah State Bar v. Jardine*, 2012 UT 67, ¶ 26, 289 P.3d 516, 521-2. Findings of fact must be proved clearly erroneous through compliance with marshaling. *In re Pendleton*, 2000 UT 77, ¶¶ 20, 58, 11 P.3d 284, 287, 299.

The Utah Supreme Court ultimately determines discipline. *Barrett*, ¶ 11, UTAH CONST. art. VIII, § 4.

Statutory interpretation (question of general law) is reviewed for correctness. *Johnston v. Labor Comm'n*, 2013 UT App 179, ¶ 13, 307 P.3d 615, 620 (citations omitted).

OPC has the burden of proof. R. Prof. Conduct Rule 14-517.

DETERMINATIVE LAW

Utah Constitution, Article VIII, section 4

Rules of Professional Conduct, Rule 8.4(d)

Rules Professional Conduct Rule 14-517.

Utah Code Ann. §34A-2-601(2) (LexisNexis 2011)[3]

Utah Code Ann. §34A-1-104 (LexisNexis 2011)

Utah Code Ann. §34A-2-802 (2012)

Admin. Code R. 602-2-2.

STATEMENT OF THE CASE

A. Nature of the Case

This is an attorney discipline case, alleging conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

B. Course of Proceedings

The district court presided over a trial.

C. Disposition in the Court below

The district court dismissed the *Complaint* with prejudice.

STATEMENT OF THE FACTS

1. Third District Court Judge Andrew Stone (hereinafter "the court") presided over a

[3]Section 34A-2-601 was amended in 2013. *See* 2013 Utah Laws Ch. 428. The amendments are not material to this appeal, therefore Mr. LaJeunesse cites to the last published version of the code throughout this brief. *See* Utah Code Ann. § 34A-2-601 (LexisNexis 2011), Addendum Ex. 3 (Resp. Ex. 1).

five day trial, issuing detailed Findings of Fact and Conclusions of Law on March 16, 2016, indicating the *Complaint* should be dismissed with prejudice. Addendum Ex. 1.

2. The ALJs of the Adjudication Division (Division) of the Utah Labor Commission (Commission) adjudicate inter alia, disputes between occupationally injured employees and their employers and/or their insurance carriers for workers compensation benefits. Utah Code §34A-2-801 (2012), *Findings*, ¶ 5, R. 1027.

3. Two of these ALJs were attorneys Richard LaJeunesse (LaJeunesse) and Debbie Hann (Hann).

4. LaJeunesse, an attorney since 1987, licensed in Utah since 1996, began his Utah career as a hearing officer at the Labor Commission in 1995, *Findings*, ¶ 3, R. 1026, and became an ALJ within the Division in 2000. Except for the instant matter, he has never been disciplined by an employer or faced a bar complaint. He received three Governor's Awards for excellence related to his employment at the Commission, and an individual award from Governor Huntsman for integrity. LaJeunesse, R. 595-601, 1174-5, 1507.

5. Hann and LaJeunesse had the highest rates of all the Commission ALJs of being upheld on appeal at both the Commission and the Utah Court of Appeals. LaJeunesse, R. 1249-50, *see also* Hayashi, R. 1813. According to Dawn Atkin, an

attorney who has practiced exclusively in the field of workers compensation, representing injured workers for twenty-three years, LaJeunesse's opinions were "always very well written [and] timely . . . so important to injured workers. . . . [He brought back to the Commission] the full decision with a good outline of facts, a good outline of conclusions of law and order. . . ." Atkin, R. 2060, 2063-4.

6. Hann was very good at writing orders, her decisions stood on appeal, and she was the fastest judge at the Commission. Atkin, R. 2064.

7. LaJeunesse and Hann were two of the very best judges at the Commission according to Ford Scalley, who has practiced before the Commission since 1971, doing mostly defense work. Scalley, R. 2104.

8. LaJeunesse was presiding judge and Director of the Division from 2001 until 2012, during which time he supervised other ALJs, including Hann. LaJeunesse, R. 1175, *Findings*, ¶ 3, R. 1026-7. All of LaJeunesse's actions were taken as part of his duties as an ALJ and Director of the Adjudication Division. *Findings*, ¶ 30, R. 1030, LaJeunesse R. 1274.

9. Commission ALJs are expected to take an active role in obtaining all facts necessary to get to the truth of the case. Utah Code Ann. §34A-2-802, LaJeunesse, R. 1502-3, Commission ALJ Holley, R. 2162, *Sutton v. Barker*, 2010 UT Wrk. Comp. Lexis 105 (ALJ directed to "take affirmative steps, including issuance of

subpoenas" to obtain critical testimony) at Resp. Ex. 13, Bates 33. Contrast OPC's characterization that Hann rejected reports "not to her liking. . . ." OPC.Brief[4], Fact ¶ 9.

10. Commission ALJs are expected to be experts in the field. *Price River Coal Co. v. Indus. Comm'n of Utah*, 731 P.2d 1079, 1084 (Utah 1986) (determination of benefits relies "heavily upon the Commission's expertise. . . .").

11. Workers compensation cases place merits over procedure or evidentiary technicalities when possible. *Kallas v. U.S. Steel*, 2006 UT Wrk. Comp. LEXIS 78 at Resp. Ex. 6, Bates 13-4, citing 34A-2-802(1). Commissioner Hayashi (Hayashi) did not know ALJs' duties included investigation, ALJs were to adjudicate cases in the best way to ascertain the substantial rights of the parties, or that Commission's statutes allow simplified methods for proof. Hayashi, R. 1879-80.

12. From approximately 2001 forward, LaJeunesse and Hann revised administrative code rules for the Division in addition to carrying full case loads, drafting forms for use by applicants, and writing the Division's first policies. LaJeunesse wrote from scratch administrative code provisions, while overseeing the Division (including workers' compensation cases, employment discrimination appeals, OSHA penalty cases, Division of Industrial Accidents penalty cases, and hearings

[4]For purposes of clarity, OPC's Appellant's Brief is referenced as OPC.Brief, and WCF's Amicus Curiae Brief is referenced as WCF.Brief. Roman numerals reference the Point number.

for the Departments of Corrections and Agriculture). LaJeunesse relied on Hann's extensive prior administrative law experience as presiding law judge in the Department of Human Services and her knowledge of the Utah Administrative Procedures Act. LaJeunesse, R. 1200, 1503-5. Before there were policies, LaJeunesse worked from flow charts, administrative code, and statutes. LaJeunesse, R. 1176, 1183. Hayashi testified Division directors could state what a policy is, and it did not have to be in writing, R. 1886.

13. As Director of Adjudication, LaJeunesse required ALJs to resolve conflicts of fact per *Intermountain Health Care, Inc. v. Bd. of Review of the Indus. Comm'n of Utah*, 839 P. 2d 841, 847 n.7 (Utah App. 1992) (role of ALJ and Commission to make findings of fact is nondelegable duty), *Price River Coal*, 731 P.2d at 1083-4. Such interim findings, used by the medical panels, are not described in the statute. LaJeunesse, R. 2150-2.

14. In cases involving conflicting medical opinions generally between the treating physician (renders an opinion as to the origin and compensability of the claimed injury) and the employer or insurer's physician (retained to perform an independent medical examination), *Findings*, ¶¶ 7-8, R. 1027, the ALJ may appoint a medical panel to advise and assist the ALJ regarding the contested medical aspects of the case. Utah Code Ann. §34A-2-601(1), Utah Admin. Code R. 602-2-2, *Findings*, ¶ 6, R. 1027.

15. Medical panels are physicians compensated by the Commission, and adjunct to the ALJs. *Findings*, ¶¶ 10, 16, R. 1028-9, LaJeunesse, R. 1175-6, 1184, Hayashi, R. 1781-2, 1841 ("they are adjunct to the ALJs"), *Doherski v. Big Horn Trucking and Workers Compensation Fund*, Commission Order, Case No. 07-0734 (medical panel adjunct to impartial fact-finding responsibilities of ALJ and Commission) at Resp. Ex. 18, Bates 49, *Owens v. Beckstrom Body Shop*, Commission Order Case No. 02-0214 (panel is impartial adjunct) at Resp. Ex. 5, Bates 11.

16. "The function of the medical panel is to give the Commission 'the benefit of its diagnosis . . . within . . . its expertise.' *IGA Food Fair v. Martin,* 584 P.2d 828, 830 (Utah 1978)." *Intermountain Health Care*, 839 P.2d at 845 ("role . . . is only 'to assist the [ALJ] in deciding whether medical cause has been proven[,]'" citing *Price River Coal,* 731 P.2d at 1084 (footnotes omitted). Contrast OPC.Brief, Fact 6, blurring the impartial role of the panel with "independence," and WCF.Brief, II(A) at 16, with citations to WCF attorneys Lloyd and Scheffler mistakenly claiming panels are "independent." The word independence does not appear in §34A-2-601. *See* Court's comment, R. 2026.

17. Some practitioners correctly understood the role of the medical panels (Atkin: "they are just like a judge," "they are the judges' doctors", R. 2071, Scalley: they are "basically arms to help the [ALJ] in deciding a case where there is conflicting medical evidence."), R. 2102.

18. Complaints about medical panel reports had been ongoing since before LaJeunesse's time at the Commission. *Findings*, ¶ 18, R. 1029, LaJeunesse, R. 1192.

19. LaJeunesse, as Director of Adjudication, was responsible to recruit, train, and retain medical panels. *Findings*, ¶ 17, R. 1029, LaJeunesse, R. 1435. All medical panel training was in-house. *Id.* Training sessions were held at least once a year. *Findings*, ¶ 20, R. 1029, Resp. Ex. 22 (LaJeunesse's Training Agendas 2008-2012). LaJeunesse wrote the *Medical Panel Process Summary (Process Summary)*, R. 1272, 1435, used to train the panels. Resp. Ex. 8. LaJeunesse also met with attorneys quarterly to learn their concerns, tried to address physicians' concerns when they raised questions on their cases, and conducted one-on-one training of new panel chairs, R. 1190, 1275, 1435, 1528, 1540. *See Findings*, ¶¶ 20-21, R. 1029. No statute guided the orientation and training process. LaJeunesse, R. 1190, 1202, 1435. Hayashi was unaware of the training process, and was a "hands off" administrator. R. 1844-5, 1887.

20. The *Process Summary* directed the panel chair to contact the judge concerning "any questions about the Medical Panel Referral[,]" and to "return[] [the report] to the referring judge. . . ." Resp. Ex. 8.

21. ALJs' interim findings resolved factual disputes (*e.g.*, the weight of a box being lifted, or mechanism of injury), which were binding on the panel; leaving the panel

to resolve only outstanding medical issues. *Findings*, ¶ 11, R. 1028, LaJeunesse, R. 1255, 1260-1.

22. Parties had been on notice since at least 2000, via the ALJs' template letters sent to medical panels with interim findings of fact, Resp. Ex. 2, that panel members were free to "contact the judge concerning any questions about the Medical Panel Referral." *See Findings*, ¶ 21, R. 1029, Resp. Ex. 8, 15, Hayashi, R. 1857, LaJeunesse, R. 1253-4. Nobody had ever objected to the *ex parte* communications. LaJeunesse, R. 1254, 1427. *Ex parte* communications continued to at least the time of trial. Atkin, R. 2065-6, Scalley, R. 2110, Thomas, R. 2128.

23. In late 2011 and early 2012, complaints about the quality of medical panel reports heated to the point of "boiling over." *See Findings*, ¶ 22, R. 1030, LaJeunesse, R. 1209-10, 1212, Lloyd, R. 1321-3, Hayashi, R. 1859, 1978, Resp. Ex. 23.

24. Workers Compensation Fund (WCF)'s own physician, Dr. Stewart, worked directly with the Commission and drove many of the complaints. Stewart had particular concerns over Dr. Hurwitz's reports. Hurwitz, a pain specialist, appointed to address pain issues, had found causation (against WCF) in five permanent total disability cases, costing WCF a lot of money. LaJeunesse, R. 1208, 1210, 1446-7, Scheffler, R. 1594, Lloyd, R. 1321-2, 1324.

25. WCF complained panels lacked experience, chased obscure and highly unlikely diagnoses, recommended tests or procedures that lacked validity, and were too

involved in pain issues. Lloyd, R. 1322-3, Resp. Ex. 23, Bates 65.

26. In February 2012, the Commission's Director of Industrial Accidents noted WCF's attorney Lloyd's conversation about "encouraging solutions on behalf of the [WCF]." Resp. Ex. 29.

27. In late 2011 and early 2012, two new medical panel chairs, Dr. Thomas and Dr. Rosen, generated reports that received a lot of objections. Holley, R. 2157. Dr. Holmes also needed training, LaJeunesse, R. 1226-7.

28. On January 10, 2012, Holley queried, "[d]o we need to start returning . . . reports to the med panel doctors if they don't satisfy the standard outlined in that recent Court of Appeals case. . . ?" R. 2156-9, Resp. Ex. 23. On January 17, 2012, Commission ALJ Lima wrote "[j]udges and [medical panel] chairs may wish to invite more communication about the case. . . ." Resp. Ex. 60, LaJeunesse, R. 1450.

29. In early January 2012, the Commission discussed increasing supervisory oversight of the reports, including returning the reports for failure to meet legal standards. Resp. Ex. 23, Bates 65-6, LaJeunesse, R. 1542.

30. If a panel report did not adequately support its decision, the case was remanded and assigned to a new medical panel to better flesh out issues. Holley, R. 2159-60.

31. Such remands cause delay and harm to all parties, and even non-parties. Holley, R. 2159-60.

32. There were no explicit or implicit guidelines on how the ALJs should train the medical panels, nor were there any policies on the issue. Hayashi, R. 1825, 1838.

33. LaJeunesse had complete discretion on how to train the panels. Hayashi, R. 1838.

34. Complaints about the panels included their failure to understand legal definitions applicable to injured workers. *See Findings*, ¶ 19, R. 1029, Resp. Ex. 24, LaJeunesse, R. 1443-5. For example, aggravation or exacerbation of a preexisting medical problem could be compensable. LaJeunesse, R. 1444-5, *Price River Coal*, 731 P.2d at 1081 (discussing the definitive case of *Allen v. Indus. Comm'n*, 729 P.2d 15 (Utah 1986) standard of focusing on questions of legal and medical causation).

35. Medical stability is legally defined (healing has ended, condition will not improve), so ALJs needed to make sure panels used correct terms. *See Findings*, ¶ 19, R. 1029, LaJeunesse, R. 1440, *Booms v. Rapp*, 720 P.2d 1363, 1366 (Utah 1986) at Resp. Ex. 29, Bates 62.

36. Because the legal concept of medical causation has been developed through a long line of case law, that legal definition may have no distinct meaning to the doctor. If the report does not describe whether the accident contributed to the current problem, even if it did not cause it; or answer the question of whether the accident caused the need for surgery, the report is legally flawed. Atkin, R. 2067-8.

37. Doctors were uncomfortable using definitive answers such as "yes" or "no"

required in order for the report to align with case law. *See Findings*, ¶ 19, R. 1029. Even use of the word "likely" (rather than a definitive statement) had caused an appeal. Hayashi, R. 1936, LaJeunesse, R. 1437, 1474.

38. The statute states:

> (b) A medical panel . . . shall make:
>
> (i) a report in writing to the administrative law judge in a form prescribed by the Division of Adjudication; and
>
> (ii) additional findings as the administrative law judge may require.

Utah Code Ann. §34A-2-601(2)(b). *Findings*, ¶ 13, R. 1028. OPC does not cite to section (2)(b) in its brief.

39. The statute further states:

> An administrative law judge shall promptly distribute full copies of a report submitted to the administrative law judge under this Subsection (2) by mail to:
>
> (A) the applicant;
>
> (B) the employer;
>
> (C) the employer's insurance carrier; and
>
> (D) an attorney employed by [the above].

Utah Code Ann. §34A-2-601(2)(d). *Findings*, ¶ 14, R. 1028.

40. Neither "in a form prescribed" nor "promptly" are statutorily defined.

41. LaJeunesse and Hann were at all times charged with interpreting §34A-2-601.

Hayashi, R. 1840.

42. Under §34A-2-601(2)(b), the report is written to the administrative law judge.

43. In January 2012, LaJeunesse and Hann discussed whether the statute permitted the ALJ to reject a report and request changes to its form to comply with legal requirements applicable to the reports. *Findings*, ¶ 23, R. 1030. LaJeunesse read §34A-2-601(2)(b) to allow use of adjudicatory discretion to request additional findings, and make sure the report was in proper legal form before sending it to the parties; or to train the panel. *Findings*, ¶ 24, R. 1030, LaJeunesse, R. 1178, 1188, 1420. The court found LaJeunesse, R. 1189, 1219, had a good faith belief that his statutory interpretation permitted the return of a signed report to a medical panel for technical revision was correct. *Findings*, ¶ 25, R. 1030.

44. LaJeunesse's purpose in permitting return of reports was to correct errors of law or phrasing in the reports ("put it into proper form", R. 1424) and to train the physicians who had prepared them, with no purpose to substantively change the medical opinion or the underlying result in any of the cases; *Findings*, ¶ 26, R. 1030, to address complaints about report quality while avoiding costly and harmful appeals. The new approach was to address persistent issues. LaJeunesse, R. 1424, 1535-7, 1554, 1560.

45. LaJeunesse, R. 1518, 1566-7, and Hann reasoned that seeking clarifications under (2)(b) before distributing the reports under (2)(d) followed legitimate constructs of

statutory interpretation under *Esquivel v. Labor Comm'n of Utah*, 2000 UT 66, ¶ 24, 7 P.3d 777, 782.

46. The statute does not require notice to the parties if the ALJ seeks additional findings. Hayashi, R. 1811, 1822-3, §34A-2-601(2).

47. No appellate court has ruled on ALJs LaJeunesse's and Hann's interpretation. Hayashi, R. 1823.

48. Prior practice of distributing flawed reports was ineffective in resolving obvious legal issues, resulting in rounds of objections and harmful delays. Past methods of training had not calmed the "furor" over flawed reports. LaJeunesse, R. 1206, 1551-2.

49. Between January of 2012 and June 6, 2012, Judge Hann, in five separate workers' compensation cases, requested written clarifications to the medical panel reports under §34A-2-601(2)(b)(i), (ii) without notice to the parties. Hann determined the medical opinions would not change before seeking the clarifications. LaJeunesse, R. 1473-4. In two of the cases, the doctors had already asked LaJeunesse to review draft reports prior to submission, but he did not have time to do so. LaJeunesse, R. 1207-8, Resp. Ex. 31.

50. No testimony was offered by any witness suggesting that the changes in these three cases known to LaJeunesse did not address legitimate concerns over the legal form of the reports. No testimony was offered that any of the medical opinions in the

reports were substantively altered as a result of the contact from Hann or LaJeunesse. *Findings*, ¶¶ 34-7, R. 1032. OPC conceded the point, indicating it was not relevant for purposes of violation of Rule. 8.4(d). R. 2181-2, Resp. Ex. 75 (Hennebold's letter describing four of the five cases: Case A, "the medical panels stated the same ultimate opinion to the two questions. . .", Case B, "[t]he panel's ultimate conclusions and recommendations did not change from the first version to the second version", Case C, "the revised . . . report used more temperate language, approved more sessions with a physical therapist and recognized the propriety of using over the counter medications," Case D, "the panel's ultimate conclusion remained the same in both the original and the revised reports."), *see also* Hayashi, R. 1980-1. The Governor's Audit (Audit) found the "Medical Panel chairs do not believe changes impacted outcomes." Pet. Ex. 104 at 10 (P 0246), WCF.Brief at 10 listing Audit details. Acosta testified, R. 2047, the changes in Boyt "had no substantial effect" and were just language choice changes. WCF erroneously asserts changes were "by definition, substantive." WCF.Brief., III(B) at 24-5.

51. LaJeunesse was personally involved in one of the five cases, involving Dr. Holmes' report in *Swenson v. Modern Display*. LaJeunesse discussed with Holmes that the final report would clarify that Holmes had not relied solely on treatment guidelines (which Holmes favored), thereby back-dooring non-binding

protocols in violation of administrative rules process, but rather, had reached his own independent conclusion. LaJeunesse confirmed the clarification would not change Dr. Holmes's ultimate medical opinion prior to requesting the clarification. Holmes agreed to change the report, offering to bring in an amended report personally. *Findings*, ¶ 31, R. 1031, LaJeunesse, R. 1224-7, 1515, 1554, 1560-61, Resp. Ex. 50.

52. The original and revised report in the *Boyt* case, which LaJeunesse knew about, along with the doctor's explanations for the clarifications, were provided to the parties. LaJeunesse, R. 1470, Acosta, R. 2045. Dr. Rosen, the physician in the *Boyt* case, at Hann's request, clarified the probability on causation to a definitive "no" answer where the probability was less than 2%. The change did not alter Dr. Rosen's opinion to original answers to questions posed. *Findings*, ¶ 35-6, R. 1031-2, Resp. Ex. 40, Bates 96, Rosen, R. 2041-2. This issue had previously caused appeal. LaJeunesse R. 1551-2.

53. Judge Hann sent back the *Duheric* case, the third case known to LaJeunesse, for the medical panel to clarify that it relied upon her interim findings of fact rather than the worker's varied stories, as required (*supra*, Facts, ¶ 13, p. 8). WCF appealed the same issue in *Right Way Trucking, LLC. v. Labor Comm'n*, 2015 UT App 2010 ¶ ¶ 7, 9, 357 P.3d 1024, 1026-7 at Resp. Ex. 40, Miller R. 1693-4, LaJeunesse R. 1551-2. The original, revised (Dr. Rosen deleted discussion of

alternative versions of the fall at issue) and letter of explanation on *Duheric* were provided to the parties. LaJeunesse, R. 1470, *Findings*, ¶ 36, R. 1031-2. Dr. Rosen testified he made no changes to the ultimate medical conclusions, R. 2041. Even though Hann was no longer on the case, the successive ALJ did not appoint another panel. Petersen, R. 1746-7.

54. Prior practice of distributing flawed reports did not morph into policy, nor could it supercede the statute. *Johnston*, 2013 UT App 179, ¶ 22 (court was not persuaded that "Board's supposed preference [for multi-member panels under §34A-2-601] has somehow morphed into a binding practice that supercedes the statute[]"), LaJeunesse, R.1423-4.

55. LaJeunesse, R. 1178, 1189, 1200, and Hann knew of no policy preventing requesting clarifications to the panel reports either as a device to train the medical panels or to avoid appeals over known legal issues; and the court found no written policy expressly forbade return of the panel report to the panel. *Findings*, ¶ 56, R. 1034, Hayashi, R. 1855. Hann and LaJeunesse in 2009 had written the existing policy, which was stored on LaJeunesse's computer and in the Commission's internal intranet system, accessible only to employees. *Findings*, ¶ 57, R. 1034, LaJeunesse, R. 1183, 1480, 1517-9.

56. On June 5, 2012, Dori Petersen, workers' compensation defense counsel at Blackburn & Stoll, called the Commission on one of her cases. The clerk

informed her that the case had been returned to panel status after Hann received a report from Dr. Rosen, but rejected it, "to have something corrected before it was sent out to the parties." *Findings*, ¶ 38, R. 1032, LaJeunesse, R. 1216. The clerk explained the doctor was new and needed instruction. The Commission incorrectly informed Petersen she would not get the original report because it had been shredded. Petersen subsequently received both the original and clarified reports. Petersen, R. 1716-7, 1719, 1722, Resp. Ex. 37, Bates 88, *Findings*, ¶ 40, R. 1032.

57. Petersen wrote in an email copied to WCF, "[i]f it were anybody but Judge Hann, I probably wouldn't think much about this, but it's Judge Hann," further describing the medical panel as a wild card. *Findings*, ¶¶ 38-9, R. 1032. "She was a difficult judge, and I always had to prepare my cases very well[]", R. 1717. Petersen "felt like Judge Hann was more applicant oriented" and speculated the return of the report to the panel was because the doctors' opinions favorable to defense were "ruffling . . . feathers [at the Commission]." R. 1718, Resp. Ex. 37, Bates 88.

58. Hayashi requested the Audit, and ordered an investigation, releasing her Report on July 10, 2012. The Commission concluded, and the court found, there was "no basis to believe" that Hann and LaJeunesse attempted to "influence the panels' opinions or change the substance of their reports." "Instead," the Commission concluded, they "were motivated by a desire to have the medical panels clarify

their conclusions." *Findings*, ¶¶ 29, 44, R. 1030, 1033, LaJeunesse, R. 1460, Resp. Ex. 36, 56, Pet. Ex. 104 at P 0244, Resp. Ex. 57, Bates 158, Transcript Hayashi ("We don't believe there is any basis that the ALJs engaged in any type of questionable communications with the medical panels in an effort to influence the panels' opinions or change the substance of their reports. Instead, it appears the ALJs were motivated by a desire to have the medical panels clarify their conclusions. . . .").

59. LaJeunesse and Hann had no desire to change medical opinions, intending only to "address[] the criticisms and the concerns" being raised by the parties, making sure panels had the "proper legal framework for what they were doing," were "relying on the interim orders, . . . [and] using a correct legal framework for . . . making their decisions and not confusing medical opinions with legal opinions." LaJeunesse, R. 1189.

60. Commissioner Hayashi accepted "that [Hann's] intent was to ensure that the medical panel reports were 'finalized' . . . in proper form under Section 601(2)(b)". Hayashi, R. 1880, Resp. Ex. 59, Bates 190.

61. Dr. Thomas, one of the panelists in a case at issue, testified that neither Judge Hann nor Judge LaJeunesse ever attempted to influence any medical decision he was making, nor could they have. Thomas, R. 2116-7, 2125.

62. The medical panel report is not admitted into evidence until three things occur,

even though only two are expressed in §34A-2-601. *Johnston*, ¶¶ 26-30, 307 P.3d at 623-4. Under -601(2)(d)(iii), the report is considered admitted if no written objection is filed. *Concl.Law,* ¶ 6, R. 1036.

63. The Commission has a lot of pro se litigants, requiring the judge to take an active role. LaJeunesse, R. 1502-3.

64. Hearings, though rare, may be held to resolve objections. *Johnston*, ¶¶ 26-30, Miller, R. 1694.

65. A report may be admitted if there are "no readily apparent deficiencies" over objection and without a hearing. *Johnston*, ¶ 30, LaJeunesse, R. 1568-9.

66. The ALJ may exclude the report if there are "readily apparent deficiencies" or if "substantial" conflicting evidence supports a contrary finding. *Findings*, ¶ 12, R. 1028, *Johnston*, ¶ 30, §34A-2-601(2)(e)(ii), -601(2)(g)(ii), LaJeunesse, R. 1492, *Sutton v. Barker*.

67. Two of the medical panel physicians appreciated the input regarding clarifications. "[T]hey had been asking for it for awhile." LaJeunesse, R. 1541.

68. After the events in question, the Commission instructed the ALJs they could no longer interpret the statute as they had. LaJeunesse, R. 1481.

69. No other ALJ under Commissioner Hayashi had been disciplined for interpreting the law. Hayashi, R. 1882.

70. Appellate courts have disagreed with the Commissioner's interpretations of the

law. Hayashi, R. 1882.

71. Hayashi testified that the problem was the failure to inform the parties of the decision to return the report or notify parties of the nature of the changes requested. *Findings*, ¶ 49, R. 1033, Hayashi, R. 1810. OPC argued at trial that interpretation of §34A-2-601 was not an issue, but the issue was the lack of transparency. Townsend, R. 2170, 2177. Contrast OPC.Brief, II, asserting the court erred in finding LaJeunesse's interpretation of the statute was reasonable.

72. The first policy on transparency was not enacted until October 2012, months after the events in question. Hayashi, R. 1926-7, 1972-3, LaJeunesse, R. 1249, Resp. Ex. 36, 49.

73. The Audit revealed five cases total were sent back to the panels without notice to the parties, *Findings*, ¶¶ 44-6, R. 1033, three of which had already been reported to the Commission by Hann and LaJeunesse prior to them being locked out. LaJeunesse, R. 1238, 1484-5. In four cases, original reports were recovered, and in all three cases known to LaJeunesse. *Findings*, ¶¶ 44-46, R. 1033, Resp. Ex. 75. At trial LaJeunesse learned that the interim acting director of adjudication retrieved the original report and provided both reports to the parties on the fifth case. Hayashi, R. 1806-8. The Audit revealed, and the court found, that no judges other than Hann and LaJeunesse engaged in these acts. *Findings*, ¶ 55, R. 1034. Parties in all cases still had the opportunity to object. LaJeunesse, R. 1219, 1239-

40, 1478.

74. LaJeunesse agreed to retrieve the original reports, but he was placed on administrative leave, placed under a gag order and forbidden to have contact with anyone involved after he had retrieved just two of the original reports. LaJeunesse, R. 1234, 1236, Hayashi R. 1805-6, Resp. Ex. 43.

75. To obtain the original drafts, LaJeunesse contacted medical panel doctors and asked for copies of the first report. Though Hann had shredded two of the initial reports, *Findings*, ¶ 31, R. 1030, LaJeunesse retrieved those same two reports from the panel. LaJeunesse, R. 1186, 1238. LaJeunesse was initially unaware Hann or her staff had shredded the first reports, *Findings*, ¶ 32, R. 1031, but was not concerned about the acts because they were draft reports and the information contained therein is highly confidential. *Findings*, ¶ 58, R. 1034, LaJeunesse, R. 1214, 1531, 1568, Resp Ex. 79, Bates 286-7, Hayashi R. 1868. OPC erroneously states Hann shredded four of the five reports. OPC.Brief at 14.

76. LaJeunesse was unaware (and the court found, *Findings*, ¶ 59, R. 1035) of Hann requesting status changes in the SPUD ("system perpetually under development") data base system, but testified if Hann asked anyone to delete anything, "she did a miserable job" because the information was there, in the public record. The SPUD system accurately reflected that the report was returned. LaJeunesse, R. 1216, 1220, 1532, 1534.

77. In *Swenson v. Modern Display*, the parties received both the unclarified and clarified reports, along with Dr. Holmes' explanations of why he made the changes. The new ALJ informed the parties the report had been sent back to the panel to address a "procedural issue". Miller, R. 1668, 1688, Lloyd, R. 1305, 1373-4. Holmes appreciated the ALJs' guidance. Lloyd, R. 1374. Both the losing party and Miller (WCF) requested the original report be "eliminated from the record", (and asked for a new panel and a different judge) prior to Miller complaining to the Utah State Bar that "evidence had been destroyed." Resp. Ex. 60, Miller, R. 1660-1.

78. The SPUD case tracking system (public information) accurately reflected the return of the case to "panel report pending" status when the flawed reports were returned. Hayashi, R. 1862-3, LaJeunesse, R. 1216, 1533-4. No clerk was asked to delete reference to the report being returned, because the system accurately reflected the case report had been returned. LaJeunesse, R. 1534. The SPUD system had limitations for case tracking, and if SPUD reflected the report as "received" when it had in fact been returned to panel status, the time limit for the judge to issue an order would have been erroneously triggered. LaJeunesse, R. 1532-3. Contrast OPC's mistaken claim that LaJeunesse "assist[ed] and advis[ed] Hann" in "(3) instructing staff . . . to delete references. . . .", OPC.Brief, Fact 8.

79. OPC conceded at trial, and the court found, there was no evidence LaJeunesse

knew any reports were shredded, *Findings*, ¶ 58, R. 1034, 2028-9, 2039-40. Nor was there any evidence LaJeunesse knew the SPUD database was changed until after the fact. R. 2031, 2037. The court dismissed allegations of shredding documents or approving data base alterations for lack of evidence. R. 2040. Contrast OPC's unsupported claim on appeal that LaJeunesse "assist[ed] and advis[ed] Hann" "when she engaged in conduct" including "(2) shredding original . . . reports. . . ." OPC.Brief, Fact 8.

80. No testimony was introduced that any party appealed, despite all of them having notice and opportunity, and none of the three cases LaJeunesse knew about was appealed. *Findings*, ¶ 50, R. 1033, Hayashi, R. 1807, *Cf.*, LaJeunesse, R. 1485. No testimony was introduced that any party lost faith in the administration of justice as a result of these actions. WCF speculated, without informing its client, that this was the case. *Findings*, ¶ 50, R. 1035, Lloyd, R. 1365-6, Acosta, R. 2047-8, Miller, R. 1700-1 (the issue was the lack of transparency). The events drew unfavorable media attention. *Findings*, ¶ 61, R. 1035, LaJeunesse, R. 1235.

81. The acts of the Commissioner caused harmful delays. Attorney Burke, plaintiffs' counsel who has practiced before the Commission since 1996, had a case previously scheduled for a hearing before Hann that was delayed due to a recusal filed by Blackburn & Stoll (Petersen, R. 1735) of which Burke had no notice. Delay hurts his clients. Burke, R. 2055-7.

82. Had the Commission backed the ALJs' interpretation rather than panicking, the process would have been streamlined rather than delayed, as ultimately happened. La Jeunesse, R. 1553.

83. On June 5, Hennebold met with LaJeunesse and directed LaJeunesse to copy the parties on any rejections or instructions to medical panel reports. Hennebold believed while "Hann's actions may have been entirely appropriate, the lack of transparency is inappropriate." *Findings*, ¶ 41, R. 1032, Resp. Ex. 39. June 8, 2012, after the events in question, Hayashi directed LaJeunesse to write a policy requiring distribution of even flawed medical panel reports. *Findings*, ¶¶ 42-3, R. 1032, Hayashi, R. 1887-8, LaJeunesse, R. 1471, Resp. Ex. 42.

84. LaJeunesse amended the policy in response to the events at issue, to send out even flawed reports, to "increase transparency." *Findings*, ¶ 57, R. 1034, LaJeunesse, R. 1179, 1460, 1480, 1519, Resp. Ex. 52, Bates 124 (includes new language). The old policy was not admitted into evidence. *Findings*, ¶ 56, R. 1034, court comment, R. 1173.

85. Hayashi placed LaJeunesse on administrative leave on June 13, 2012, terminated him from his position as Director of Adjudication and ALJ on July 10, 2012 for his failure to insist on an open and transparent process, *Findings*, ¶¶ 47-8, R. 1033, then rehired him with the title of hearing officer but with the duties of ALJ, at a lower wage. LaJeunesse, R. 1241-2, 1249-51, 1576.

86. WCF attorney Lloyd filed bar complaints against Hann and LaJeunesse on August 14, 2012, supported by WCF attorney Mr. Miller's Affidavits. Pet. Ex. 117.[5] Neither Lloyd nor Miller gave any consideration to subsection (2)(b) of 34A-2-601. Lloyd, R. 1303, 1311, Miller, R. 1660, 1671. Petersen, defense counsel in the *Duheric* case, likewise failed to distinguish subsections (2)(b) and (2)(d) of the statute. Petersen, R. 1755.

87. Miller did not know ALJs provided training to the medical panels. Miller, R. 1673.

88. On August 15, 2012, WCF, through attorney Moffitt, filed its blanket motion to recuse Hann in all its cases at the Commission, attaching the still private bar complaint, R. Prof. Conduct 14-515, serving the Director of Adjudication, but not opposing counsel. *Findings*, ¶ 53, R. 1033, Moffit, Lloyd, R. 1298, Resp. Ex. 63, 70. WCF's concern was lack of transparency. The Commission granted the motion in two days, without prior notice to the other parties in the affected cases. *Findings*, ¶ 54, R. 1034, Resp. Ex. 65, Moffitt, R. 1609-11.

89. Commission ALJ Luke expressed to Commissioner Hayashi she was "awake all night" over WCF's blanket recusal. Not only had she never seen one before, but she had no notice until a transferred case landed on her desk. She complained the

[5]OPC's case against Debbie Hann is stayed pending outcome of this case because the court found "underlying these actions are the same statute and ALJ policy at issue in LaJeunesse." Addendum Ex. 4, *In re Discipline of Debbie Hann*, Bar No. 5077, Case No. 130905705, *Ruling and Order Granting Stay*, Addendum, Ex. 5, *Complaint*, *In re Hann*.

process was not transparent. Hayashi, R. 1814, 1869-71.

90. Richards Brandt Miller & Nelson, workers compensation defense, joined the effort, emailing Hayashi "to recuse [Hann] from WCF cases and not Blackburn and RBMN cases . . . does not seem right." Resp. Ex. 71, Bates 231-2. Petersen seemed envious of WCF's recusal when she wrote Miller "[b]et you're enjoying your holiday from Judge Hann!" Resp. Ex. 76, Petersen, R. 1735.

91. The Commission never informed Burke of the motion to recuse, instead providing him an alternative explanation: that his case had been reassigned because his name had been disclosed in LaJeunesse's witness list in the instant action. Burke expressed concern at trial that by agreeing to tell the truth for either party in the instant action, he had somehow gotten on the wrong side of things at the Commission. Burke, R. 2055-8, Miller, R. 1700-1.

92. Commissioner Hayashi had multiple *ex parte* non-transparent communications with a pro se injured worker litigant without entering the communications in the SPUD case management system or disclosing her contacts with defense counsel. Hayashi, R. 1954-5.

93. On at least one occasion, counsel for Hayashi, who writes her opinions on appeal, had an *ex parte* non-transparent communication with defense counsel Petersen on the *Duheric* matter. Petersen, R. 1750-1.

94. Burke testified that the process of administration of justice at the Commission has not improved since LaJeunesse was fired because LaJeunesse was one of the most

efficient and productive judges at the Commission, and delay hurts his clients. Burke, R. 2052-4, 2057.

95. Physician Dr. Thomas still speaks with ALJs at the Commission, but does not feel like he gets any help, making the work unpleasant. Thomas, R. 2127-8.

96. The current system of distributing flawed reports caused appeal and remand with assignment to a new medical panel (at least once), creating unfairness to parties by delays. Delay causes harm to carrier paying interest or worker whose treatment is delayed. Holley, R. 2159-60.

SUMMARY OF THE ARGUMENT

OPC did not carry its burden to prove the Findings of Fact clearly erroneous or show the court's legal analysis was incorrect.

ARGUMENT

Point I. OPC's Brief should be stricken.

Judge Stone, heard testimony of fifteen witnesses over five days, and received over seventy exhibits in this attorney discipline case. OPC conceded, and the court dismissed, allegations that LaJeunesse did not have knowledge of any report being shredded or of any alterations to the database until after the fact. R. 2005-2040, *Complaint* ¶ 12. At close of trial, the court was fully briefed on the merits and took the matter under advisement for nineteen days, issuing its nineteen page decision containing sixty-one Findings of Fact and thirty-two Conclusions of Law. Addendum Ex. 1.

OPC barely acknowledges the court's ruling in its brief, arguing as if this Court were in *de novo* proceedings. OPC does not append this ruling, in violation of Utah R. App. P. 24(a)(11)(C). In stating the standard of review, OPC omits its key burden to marshal the evidence supporting any finding it seeks this Court to overrule, and to demonstrate why the finding is clearly erroneous, as is required by Utah R. App. P. 24(a)(9). *See In re Pendleton*, 2000 UT 77, ¶¶ 20, 58, 11 P.3d 284, 287, 299.

OPC does not cite to the record to show where its issues were preserved below, as required by Utah R. App. P. 24(a)(5)(A), or in the alternative, articulate grounds for seeking review of issues not preserved in the trial court under Utah R. App. 24(a)(5)(B). Nor does OPC cite to the record in support of numerous factual assertions in its brief, particularly in the argument section. This violates Utah R. App. P. 24(a)(7), (a)(9) and (e).

While this Court has tempered the marshaling requirement, *State v. Nielsen*, 2014 UT 10, ¶ 41, 326 P.3d 645, 653, and has broader discretion in appeals from attorney discipline proceedings, *Office of Professional Conduct v. Barrett*, 2017 UT 10, ¶ 11, this Court is not the depository wherein a party may dump its burdens of appellate advocacy. *Cf.*, *e.g.*, *Hi-Country Prop. Rights Group v. Emmer*, 2013 UT 33, ¶¶ 13-14, 304 P.3d 851, 854-5 (district court exceeded breathing room in deferential standard of review).

As a result of OPC's failure to marshal the evidence, this Court need not reach the merits of OPC's argument. *Ostermiller v. Ostermiller*, 2010 UT 43, ¶ 19, 233 P.3d 489,

494. As a result of its failure to comply with rule 24, this Court may strike or disregard OPC's brief. *See* Utah R. App. P. 24(k).

Point II. OPC failed to identify flaws in the district court's order requiring reversal.

This Court presumes the district court's findings of fact are correct. *Barrett*, 2017 UT 10, ¶ 11. OPC asserts its own version of facts on appeal, often without support, rather than analyzing the detailed *Findings* of the court. *E.g.*, OPC asserts LaJeunesse's conduct violated "statute and policies", OPC.Brief, I, at 12-19, yet instead addresses past practice, lack of transparency, and only a portion of the relevant statute.

A. Deviation from past practice does not constitute a violation of Rule 8.4(d).

OPC asserts that deviation from practice at the Commission, before and after LaJeunesse's conduct, of distributing flawed reports, constitutes violation of Rule 8.4(d). OPC.Brief, I, II, at 13-14, 20-21. OPC cites no law prohibiting departure from practice. Past practice does not morph into policy. *Johnston*, ¶ 22, Facts, ¶ 54.

Lawyers and judges necessarily rely on creative or new interpretations of the law. *Concl.Law*, ¶ 24, R. 1041. Even if LaJeunesse's interpretation of the statute were erroneous, *Worthen*, 926 P.2d at 868-9, informs that "a judge has not behaved improperly simply because he has committed an error." Although *Worthen* applied to a judge rather than an ALJ, reliance on interpretation of law in the role of adjudication applies here. In *Worthen*, this Court held that the "disciplinary process must concern itself only with those

who behave outside the ethical norms set for judges. . . ." *Id.*, *Concl.Law*, ¶ 25, R. 1041-2. OPC introduced no testimony, expert or otherwise, that LaJeunesse or Hann acted outside their adjudicatory roles or expertise in the field, and the court found that all of LaJeunesse's acts were within his role as an ALJ. Facts, ¶¶ 8-10, *Concl.Law*, ¶ 30, R. 1043.

OPC ignores that LaJeunesse tried to solve problems of administering adjudicative duties by attending to procedural concerns rather than allowing the inefficiencies to continue to avoid needless litigation over obvious flaws in reports. Facts, ¶¶ 31, 34-7, 48, 55, *see also* court comment, R. 2025.

B. OPC's assertion the statute did not require interpretation does not prove the *Findings* are clearly erroneous.

OPC asserts that "other witnesses . . . testified that the statute did not require interpretation," as though this is sufficient to find error. OPC.Brief, II, at 20. OPC's unsupported assertion cannot suffice (no witness or statement referenced) under Utah R. App. P. 24(a)(5)(A), (a)(9) to disprove the court's finding that La Jeunesse "had a good faith belief that his statutory interpretation permitting the return of a signed report to a medical panel for technical revision was correct[]", *Findings*, ¶ 25, R. 1030. As the court stated, "[w]itnesses don't come in and vote about the interpretation of the statute." "That's my job." R. 2019, 1289.

OPC fails to discuss subsection -601(2)(b), so important to LaJeunesse's analysis, and to the court's *Order of Dismissal* (*Order*). *Concl.Law*, ¶¶ 5-6, R. 1036-7. The statute

includes no methodology for correcting obvious flaws to the reports, but -601(2)(b) allows "additional findings as the administrative law judge may require." Rational minds may reason that seeking clarifications is logically subsumed within, or at least consistent with, seeking additional findings, as a reasonable interpretation of the law. *See Concl.Law*, ¶ 7, R. 1037.

C. OPC waived any challenge to the court's finding that LaJeunesse's analysis of 34A-2-601(2)(b) is correct.

LaJeunesse and Hann considered the statute paramount in their analysis to return flawed medical panel reports to panelists. Facts, ¶¶ 41-7, *Concl.Law*, ¶¶ 2-8, R. 1035-7.

OPC ignores subsection -601(2)(b) in its entirety, and asserted at trial statutory interpretation did not control. Facts, ¶ 71, Townsend, R. 2170, 2177, OPC.Brief at 2 (Determinative Law Section omits §34A-2-304(2)(b) or even the entire statute), OPC.Brief, Fact 5, thus OPC cannot show the court's *Order* is clearly erroneous. OPC's assertion, OPC.Brief at 19, that LaJeunesse "devised a plan that was contrary to the plain meaning of the statute" fails because it does not examine the statue as a whole, and is devoid of analysis of a significant portion of the statute – section (2)(b). The entire statutory scheme is paramount in giving effect to legislative intent. *Hertzske v. Snyder*, 2017 UT 4, ¶¶ 9-10.

The court correctly concluded LaJeunesse's view of the statute, that under subsection (2)(b), the legislature authorized the ALJ to seek additional findings and to make sure the report was in proper form prior to promptly distributing the report under -

601(2)(d) is correct. Seeking clarifications to panel reports falls logically within adjudicatory discretion. *Concl.Law*, ¶¶ 2-5, R. 1035-6, Facts, ¶¶ 37-42, 44-5.

Even assuming this Court elects to search beyond OPC's Brief, the statute does not require notice of requests for clarification, and no appellate court had interpreted that aspect of the statute. Facts, ¶¶ 46-7. Additional justifications for LaJeunesse's interpretation are the flexible standard specifically authorized by statute, and the requirement to focus on merits over procedure when possible. Evidentiary and procedural arguments run counter to the spirit and intent underlying the workers' compensation adjudicative process. Utah Code §34A-2-802, *Kallas v. U.S. Steel*, Facts, ¶ 11.

OPC failed to address §34A-2-601(2)(b), §34A-2-802, standards approved in *Kallas*, or prove the court's findings are clearly erroneous through marshaling; it has waived any challenge to interpretation of -601(2)(b); and the *Order* should be upheld.

D. Reliance on the Governor's Audit, Commission's Public Report and the Medical Panel Process Summary do not amount to flaws in the *Order* requiring reversal.

OPC relies on the Audit, OPC.Brief at 14-5, the Commission's Public Report (Report), OPC.Brief at 15, and the *Process Summary* (Resp Ex. 8 (used to train the medical panel)), rather than distinguishing the *Findings* as clearly erroneous. The court largely cites to the Audit for the number of cases involved, and the fact that no other judges at the Commission had tried this new method, which LaJeunesse does not dispute. *Findings*, ¶ 45. The Audit was "remarkably vague" because it refers to "questionable

communications". The court, R. 1812. OPC fails to marshal any evidence helpful to this Court's analysis arising from the Audit. Hayashi's Report parroted the Audit, but noted "it did not appear that [the ALJs] intended to influence the panels' ultimate opinions, but, rather, wanted the medical panels to clarify their conclusions." Pet. Ex. 107, *Findings*, ¶ 29, R. 1043. The *Process Summary* supports LaJeunesse's conduct because it invites the panel to "decisively answer only the questions asked," "feel free to contact the judge concerning any questions about the Medical Panel Referral," rely on specific Guides, and return the report to the referring judge. Hayashi, R. 1844-5, Resp. Ex. 8.

Sources cited by OPC are insufficient to prove the court's *Findings* clearly erroneous, or that the court's legal analysis was incorrect.

E. The court did not base its *Findings* solely on the "self serving" testimony of LaJeunesse.

OPC's assertion, OPC.Brief, II, at 20, that the court found "LaJeunesse's interpretation was in 'good faith' [*Findings* ¶ 25, R. 1041-2] even though the only evidence presented at trial on this issue was LaJeunesse's own self serving testimony" is contrary to trial testimony and without citation to the record in violation of Utah R. Civ. P. 24(a)(5)(A), (a)(9), treating this instead as a *de novo* review (but without support). OPC ignores testimony of ALJ Holley (sending flawed reports to the parties has not resolved the issue), Facts, ¶ 96; attorneys Burke (whose client was harmed by aftermath of the blanket recusal), Facts, ¶ 81; Atkin (LaJeunesse brought standards of quality to the Division), Facts, ¶ 5; Scalley (they lost the two best judges at the Division), Facts, ¶ 50;

Acosta (the changes to her case were insignificant), Facts, ¶ 7; Petersen ("[i]f it were anybody but Judge Hann, I probably wouldn't think much about this, but it's Judge Hann[]"), Facts, ¶ 57, Dr. Thomas (the ALJs made no effort to influence any of his medical decisions), Facts, ¶ 61; or Dr. Rosen (he made no significant changes to his medical conclusions in *Duheric*, *Boyt*), Facts ¶¶ 52-3.

OPC has failed to sufficiently refute the record or identify flaws in the *Order* requiring reversal.

F. LaJeunesse did not devise a plan contrary to the statute.

OPC urges this Court to find LaJeunesse devised a plan contrary to the statute, but fails to: examine -601(2)(b), LaJeunesse's administrative and judicial roles, or even recognize the adjudicative role to interpret statutes within the bounds of legislation. Agencies are allowed to administer portions of the code. *Belnorth Petroleum Corp. v. Utah Tax Comm'n*, 845 P.2d 266, 268 n.5 (UT App 1993). It is improper for OPC to cherry pick only subsection -601(2)(d) when the court analyzed, and LaJeunesse relied upon, subsection -601(2)(b) and the statute as a whole. *Hertzske*, 2017 UT 4, ¶ 10.

OPC disagrees with LaJeunesse and Hann, but fails to articulate why – when the ALJ can request additional findings under (2)(b), and why – when the medical panel shall make a report to the administrative law judge in proper form under (2)(b), LaJeunesse, as Director of Adjudication, and Hann, as Assistant Director, could not request clarifications without saving the signed report or providing notice under reasonable statutory

interpretation.

OPC failed to support its assertion LaJeunesse's conduct was in violation of the entire statutory scheme as required by Utah R. App. P. 24(a)(5)(A), (a)(9). OPC.Brief III at 22. OPC asserts *de novo* LaJeunesse's interpretation was incorrect, but its burden here is to show why the court's *Findings* or conclusions are erroneous. *Concl.Law*, ¶ 4, R. 1036.

G. OPC's assertion that only conduct is necessary fails to account for legal error.

OPC asserts no mens rea is necessary for a violation of Rule 8.4(d). OPC.Brief at 21. This analysis fails to account for legal error, and the instructive language of *Worthen*, 926 P.2d at 868-9, requiring, in the case of judges, something outside the ethical norms set for judges or "unjudicial conduct" for there to be an ethical violation. *Concl.Law*, ¶¶ 25-6, 29, R. 1041-3. The court correctly concluded that "an objectively reasonable position taken in good faith by an ALJ in fulfillment of his or her duties cannot support a claim that the conduct taken as a result is a violation of Rule 8.4(d)." *Concl.Law*, ¶¶ 30-31, R. 1043-4.

H. Cases cited by OPC in support of Rule 8.4(d) violation are inapposite and not controlling.

OPC cites numerous cases referencing violations of Rule 8.4(d), as though they alone should carry the day, but none apply here. OPC.Brief at 16-8. None are Utah cases. Additionally, in *In re Swarts*, *III*, ¶¶ 7, 28-9, 30-42, 30 P.3d 1011, 1014,1017-9, (Kan. 2001), the attorney caused uncertainty rising to level of conduct prejudicial to

administration of justice because attorney's stance in favor of corporal punishment (paddlings in courthouse) contradicted social services view. Swarts also manufactured evidence, violated ex parte rules, argued against reducing bond (Hispanic defendant (American citizen) might travel to Mexico and blend in); shouted to African American teen "Do you think slavery is over?"; and, inter alia, commented everyone would be better off if fourteen year old committed suicide (he would show her how).

In *In re Bankston*, 810 So.2d 1113, 1114 (La. 2002), the attorney was convicted of receiving a bribe, fined, and sentenced to prison; in *In re Schwehm*, 860 So.2d 1108, 1109, (La. 2003), the Justice of the Peace assessed and collected fines without remitting them, was convicted of malfeasance in office, and sentenced to serve years at hard labor. In *In re Darlene Mears*, 723 N.E.2d 873, 875-6 (Ind. 2000), a judge had staff perform personal favors while on public payroll (including taking child to after-hours birthday party); in *Disciplinary Counsel v. Robinson*, 933 N.E.2d 1095, 1097, 1100-01 (Ohio 2010), the attorney gave false and misleading testimony by removing and possessing firm documents on the same day he testified he did not possess them; and in *Attorney Grievance Comm'n v. White*, 731 A.2d 447 (Md. 1999), the attorney lied under oath, perjured herself, and destroyed discoverable and relevant evidence.

The cases cited by OPC, involving egregious acts, often on multiple occasions, sometimes with criminal convictions, are entirely dissimilar to LaJeunesse's good faith interpretation of the law and decision to try a new approach to resolve ongoing problems.

Point III. OPC failed to preserve its new issue that the court failed to properly assess LaJeunesse's termination.

OPC now asserts, for the first time, that the court incorrectly failed to assess LaJeunesse's termination for "violat[ing] the statute and policies of his Division". OPC.Brief, I at 12. Utah R. App. P. 24(a)(5)(A) requires preservation in the trial court or (B) grounds for review of issue not preserved. OPC cites neither. LaJeunesse had no notice in the Complaint to defend on grounds of termination. Even if he had notice, he served at will, and was rehired by the Commissioner. LaJeunesse R. 1250-1, Facts, ¶ 85. To preserve an issue for appeal, the issue must have been presented and developed in the trial court, *438 Main St. v. Easy Heat Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801, 813, and issues not raised at trial are generally waived. *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998).

Point IV: OPC's assertion that lack of transparency violates Rule 8.4(d) is without merit.

OPC, OPC.Brief at 15, 19, asserts Commissioner findings control, rather than proving the court erred in concluding OPC's view of transparency "stems from its improper view of the medical panel as a separate decision maker." *Concl.Law*, ¶ 17, R. 1039-40. The panel is adjunct. Facts, ¶ 15.

Even assuming Commission's findings were the issue, the Commission's first policy on transparency was not written until after the events in question, Facts, ¶ 72, and the Commission did not promote transparency until after the events in question. Facts, ¶¶

88-9, 91-3. Examples of Commission's failure to promote transparency include the Commission granting WCF's *ex parte* blanket motion to recuse Judge Hann in two days with no hearing or notice to opposing parties, Facts, ¶ 88; and delaying and transferring one of Mr. Burke's cases pursuant to defense complaints about being unfairly saddled with Judge Hann, without notice or opportunity for Burke to respond. Facts, ¶¶ 90-1. Hayashi refused to even share with ALJ Luke the reasons for a case reassignment as a result of the blanket recusal, Facts, ¶ 89, and admitted to failing to disclose multiple *ex parte* contacts with a pro se injured worker in the record or to opposing counsel. Facts, ¶ 92. Commission counsel Hennebold had *ex parte* contact with attorney Petersen on the *Duheric* matter. Facts, ¶ 93.

Even if transparency were controlling, the court considered Hennebold's and Hayashi's concern about lack of transparency, *Findings*, ¶¶ 41, 48, R. 1032-3, explaining that requiring transparency may inhibit free communication between the ALJs and their assistants. *Concl.Law,* ¶ 17, R. 1039. Further, the statute did not require restriction of communication between the panels and the adjudicators, *id*., nor did any existing statute or policy, formal or informal, prohibit communications or require disclosure. *Concl.Law*, ¶ 18, R. 1040.

There was no testimony that La Jeunesse instructed or authorized Hann not to disclose the communications, and the preponderance of evidence showed the purpose of the communications was to conform the opinions to the appropriate legal framework.

Concl.Law, ¶ 21, R. 1040-1, Facts, ¶¶ 51-3. OPC has failed to show the ruling is clearly erroneous because (1) there was no policy on transparency, (2) agency norms did not toe the mark on transparency, and (3) no statue or policy required disclosure of communications. OPC's reliance on transparency is flawed and insufficient to support reversal.

Point V. OPC errs in concluding the court found statutory interpretation determinative as to whether LaJeunesse violated Rule 8.4(d).

The court found attorneys and judges interpret laws all the time. *Concl.Law*, ¶ 24, R. 1041. Even if OPC's theory were correct, OPC.Brief, II, at 20, and supported by the record (it is not), under *Worthen*, the court reasoned, something more than legal error is required, such as conduct outside the ethical norms, something akin to "unjudicial conduct". *Findings*, ¶¶ 25, 29, R. 1042-3. OPC was unable to prove delay (possible support for conduct prejudicial to the administration of justice). *Concl.Law*, ¶ 27, R.1042, *see* Facts ¶¶ 30, 32, 43-5, 48, 50-51 (supporting LaJeunesse's adjudicative reasoning and institutional knowledge).

The court cited comments to Rule 8.4 in support of its ruling, *Concl.Law*, ¶ 28, R. 1042-3, and the court found that LaJeunesse's objectively reasonable interpretation was insufficient to support a violation of Rule 8.4(d). *Concl.Law*, ¶ 30, R. 1043-4, Facts ¶ 45. The court examined not only the rule, but the statute, the conduct, circumstances, and case law. OPC refutes none of these, or the *Findings*, support its argument as required by Utah R. App. P. 24(a)(5)(A), (a)(9).

For example, OPC asserts the "[c]ourt's conclusion that there is no rule violation seems inconsistent with the Standards for Imposing Lawyer Discipline[]", OPC.Brief at 21, referencing the Commission's vague pronouncement of "violation of statutes and polices." *Id*. OPC cites to no particular Standard in this section of its brief,[6] nor does it refute any of the court's *Findings* in support of its position that the "Court's finding of 'good faith' should have been used . . . to determine [LaJeunesse's] mental state, after finding that he violated the Rules of Professional Conduct." *Id*.

Even if we were to assume, and we cannot, that OPC is referencing Rule 14-604 (Factors to be Considered in Imposing Sanctions), there would have to have been a finding of misconduct. OPC's assertion seems no more than an unsupported difference of opinion. *See Cf. e.g.*, *State of Utah v. Steed*, 2017 UT App 6, ¶ 9 ("[a]n issue is not ripe for appeal if there exists no more than a difference of opinion regarding the hypothetical application of [law] to a situation in which the parties might, at some future time, find themselves." (Citations and internal quotation marks omitted). OPC failed to meet its burden to brief the issue. Utah R. App. P. 24(a)(5)(A), (a)(9), *Cf.*, *e.g.*, *Hi-Country Prop. Rights Group,* 2013 UT 33, ¶¶ 13-14.

Point VI. The court correctly found ALJ LaJeunesse did not commit conduct prejudicial to the administration of justice.

Benjamin N. Cardozo, LL.D. lectured that the:

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[6]OPC cites Standards R. 14-601(Definitions) and 14-607(Aggravation and Mitigation) in Point IV at 22.

> strange compound which is brewed daily in the caldron of the courts. . . [does] not render the judge superfluous, nor his work perfunctory and mechanical. [F]orces . . . . may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure. . . . Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side. . . .

Cardozo, B. *The Nature of the Judicial Process*, Lectures I-IV (1921). Judge LaJeunesse never stepped outside these bounds, nor was his conduct prejudicial to the administration of justice.

OPC asserts, OPC.Brief, III at 22 that "[e]ven if the court's decision to use statutory interpretation to dispose of the case, LaJeunesse's interpretation of the statute was incorrect." LaJeunesse addressed statutory interpretation at *supra* Point II(B), (C), (F), Point V, pp. 33-5, 37-8, 42-3, and lack of any Commission policy on transparency at Facts, ¶ 72. OPC ignores that subsection -601(2)(b)(i), (ii) allows for additional findings, requires the report to be written to the judge, and requires the report be in proper form.

LaJeunesse and Hann intended to use the statute to clarify flawed reports to address concerns and criticisms by making sure reports had the correct legal framework so reports could be used for rulings. Facts, ¶¶ 43-5. Even the Commissioner determined "they were motivated by a desire to have the medical panels clarify their conclusions." *Findings*, R. 1030, ¶ 29, Pet. Ex. 107, Facts, ¶ 58. OPC has thus failed to prove the court's finding there was no "misconduct" clearly erroneous, nor has it otherwise assisted this Court by marshaling the evidence supporting any finding it seeks this Court to

overrule.

Point VII . OPC errs in seeking public reprimand. OPC.Brief, IV at 22.

On its face, there cannot be conduct prejudicial to the administration of justice under Rule 8.4(d) without a showing of prejudice.

OPC attempts to support its theory of prejudice by mistakenly asserting "[s]takeholders were . . . affected in that they did not receive reports[]", OPC.Brief at 17, but all reports were retrieved and distributed. Facts, ¶ 73. Even if this were not true, LaJeunesse was placed on leave before he could complete the retrievals. Facts, ¶ 74.

OPC alternatively asserts the costs of investigation caused harm. If the costs of an investigation alone support "harm", then any allegation (which reasonably should be investigated) would support violation of Rule 8.4(d).

The "costs of investigation alone" theory ignores that the statute requires the report to be sent to the ALJ and that the ALJ has discretion under -601(2)(b). *Concl.Law*, ¶ 8, R. 1037.

The "costs of investigation alone" theory cannot be examined in a vacuum. Commissioner Hayashi, who called for the investigation, was unfamiliar with the statutes, training issues, or even decisions she had authored. Facts, ¶¶ 11, 19. Had Hayashi been knowledgeable, she might have agreed with the ALJs' statutory interpretation, thereby resolving the issue with no need for further investigation. No court had ruled otherwise. Hayashi could have just as easily directed LaJeunesse to write a policy notifying all

parties that medical panel reports would not be distributed unless they were in proper form per the Division's determination, and that there would be no further notice of iterations or clarifications to reports. Hayashi could have waited to see if any parties appealed, thus perhaps allowing an appellate court to resolve interpretation of the statute; or she could have assured stakeholders that no one claimed error since no parties appealed. She could have attempted to reach a consensus among the remaining ALJs. Taking any of these actions would have avoided the harm caused by the Commission's reaction, delays caused by the Commission's recusals, and any costs of investigation.[7]

Neither LaJeunesse nor Hann made any effort to change any medical opinion, nor was there any evidence of substantive changes to any of the reports, Facts, ¶¶ 50, 59-60, *Findings*, ¶¶ 26, 29, 34-7, R. 1030-2, nor was there any evidence the changes did not address legitimate concerns over the legal form of the reports. *Findings*, ¶ 37, R. 1032, Facts, ¶¶ 51-3.

The fact that no party appealed (as far as LaJeunesse knows), when the Commission has a very easy and liberal appeal process (no filing fee, no requirement for transcripts, no expense to parties, informal letter may suffice) additionally refutes OPC's claim of harm. Facts, ¶ 80, LaJeunesse, R. 1553-4.

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[7]If LaJeunesse prevails on appeal, members of the Bar could arguably assert harm from the costs of prosecution; and the court wondered if he agreed with LaJeunesse whether he could be exposed to possible rule violation. R. 2038. OPC thus oversimplifies the notions of cost as supportive of conduct prejudicial to the administration of justice because it is a double-edged sword.

OPC cites no cases where an attorney was found in violation of rule 8.4(d) for approval of ex parte communications with an adjunct expert.

The disciplinary cases OPC cites in support of its theory of violation of Rule 8.4(d) are inapposite and not controlling. OPC.Brief at 16-8, *see supra*, Point II(H), pp. 38-9.

Point VIII. WCF incorrectly interprets 34A-2-601 as though it is on agency appeal.

This Court granted WCF permission to file an amicus curie brief on the issues of the function of the panels and interpretation and requirements of §34A-2-601. However, rather than briefing these issues as a friend of the court, as the name amicus implies, it re-asserts itself into litigation as an advocate. Its arguments should therefore be stricken.

WCF was the complaining witness, filing bar complaints against LaJeunesse and Hann. Its attorneys and former attorneys Lloyd (senior vice president and chief legal officer and lobbyist for WCF), R. 1280, Scheffler, vice president of legal department at WCF, R. 1582, Moffitt, WCF's former counsel, R. 1598, Miller, attorney for WCF, R. 1647 testified for OPC at trial. None of them analyzed subsection (2)(b) of the statute, and Miller and Moffitt's concerns were lack of transparency. *See* ¶¶ Facts, 86, 88. WCF succeeded in removing Judge Hann on all its cases, after making "an early run at Judge Hann when she was two months in to being a judge and tried to get her disqualified from all their cases." LaJeunesse, R. 1574-5, Facts, ¶ 88. WCF is continuing to litigate as an advocate after it lost in court by cloaking itself with the mantle of amicus curiae.

Point IX. The court's ruling on the statute is not binding on the Commission.

WCF incorrectly asserts the court's ruling as binding on parties appearing before the Commission (it "would deprive parties in a Labor Commission proceeding of their statutory right to object." WCF.Brief at 11), avoiding the issue actually litigated: conduct prejudicial to the administration of justice. The precedential value of the ruling would only pertain if another ALJ at the Commission acted on a new interpretation of the statute. WCF is incorrect because parties can still object – the court did not rule otherwise. Further, given the chilling effect of this case, it is unlikely any other ALJ will risk new interpretations of any law in an effort to improve efficiency within an agency. LaJeunesse had his "reputation smeared," and "besmirched" and has spent tens of thousands of dollars defending against the accusations. R. 1192, 1236.

Point X. WCF fails to distinguish adjudicatory duties.

The court made a narrow ruling regarding the statute, because it had only to find that LaJeunesse made an objectively reasonable interpretation in support of its finding there was no conduct prejudicial to the administration of justice. The court found that LaJeunesse's "actions were either legally permitted or at least did not violate any express statute or policy." *Concl.Law* ¶¶ 30-1, R. 1043-4, Facts, ¶¶ 8-10. WCF fails to distinguish *Worthen*, 926 P.2d at 868. WCF fails to distinguish OPC's position (during the trial) that the statute was not at issue for Rule 8.4(d). Two of WCF's own attorneys asserted lack of transparency was the issue. Facts, ¶ 88.

The case before this Court is whether there was conduct prejudicial to the administration of justice. The issue of statutory interpretation is limited to whether LaJeunesse's actions were legally permitted based upon LaJeunesse's interpretations and rationale – not WCF's interpretations.

Point XI. WCF incorrectly re-inserts itself into the process as an advocate.

WCF argues statutory interpretations here, but as a party to the *Swenson* matter, one of the five cases at the Commission, WCF could have appealed once it learned of LaJeunesse and Hann's acts, yet slept on its right to appeal.[8] *Complaint*, ¶¶ 15-16, *Findings*, ¶ 34, Facts ¶¶ 77, 80. Such an appeal would have allowed full appellate review of the statutory interpretation under the facts of the case. WCF's passivity at the Commission should not be rewarded by appellate advocacy here. *State of Utah v. Steed*, 2017 UT App 6, ¶ 9 (mere difference of opinion of hypothetical application does not support appeal), *see also Clayton v. Dinwoodey et al.*, 93 P. 723, 726 (Utah 1908) ("[t]he party holding the claim . . . must pursue some measures to present his demand, and not remain passive, or sleep upon his right." (citations and internal quotation marks omitted)).

/ / /

[8]WCF asked the original report be "eliminated from the record", a position at complete odds with its assertion here that lack of notice violated notions of transparency. Facts, ¶ 77.

Point XII. WCF's assessment of the purpose of medical panels as independent is flawed.

WCF relies on Lloyd, an attorney and lobbyist for WCF to describe the purpose of medical panels. Lloyd considered only subsection -601(2)(d) of the statute when he filed the Bar Complaint, R. 1289-90, not subsection (2)(b), critical to LaJeunesse's reasoning, the court's ruling, and this Court's analysis. Now, WCF argues subsection (2)(b). WCF.Brief, II(A), III at 15-6, 20-22.

Lloyd did not believe the medical panels are adjunct to the ALJs (R. 01335-7, R. 1281), despite case law to the contrary. Facts, ¶¶ 15-16 and citations therein. Lloyd was unaware of any definition for "proper form" at trial, R. 1335, and failed to take into account that Commissioner Hayashi accepted Hann's explanation that she was trying to get the reports in proper form when Lloyd filed the bar complaint. R. 1351, Resp. Ex. 59, Bates 200. When asked about the significance of the report being in proper form, Lloyd responded that only subsection (2)(d) was relevant to the bar complaint, R. 1305.

WCF now, for the first time, as does OPC, advocates interpretation of (2)(b), WCF.Brief, III at 20-27, but this is not a *de novo* proceeding.

Point XIII. WCF's analysis ignores the salient point that the report is written <u>to</u> the ALJ.

WCF ignored -601(2)(b) in its bar complaint, Facts, ¶ 86, and now ignores discussion of the statutory requirement that the report must be submitted <u>to</u> the ALJ in its section on history, focusing instead on the language "promptly" under -601(2)(d), and

other components of -601(2)(b)(i) ("form prescribed") and (ii) ("additional findings. . . ."). This Court cannot harmonize relevant sections of the entire statute while reviewing only select portions. *Cf., e.g., Hertzske v. Snyder*, ¶ 10, *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 16, 308 P.3d 461, 467 (each part of statute construed to produce harmonious whole) (citations and quotation marks omitted).

Though the word "promptly" has floated through the statute for decades, this does not refute that the report is written to the ALJ nor does it refute that the ALJ may request additional findings and check the form of the report under (2)(b). *Johnston*, 2013 UT App 179, ¶ 13. Since WCF advocates here, the correctness standard of the court's ruling applies. *Id*. The history of "promptly" is not conclusive under the correctness standard, *Cf.*, *Id*, because this Court must harmonize relevant sections of the entire statute. *Hertzske*, ¶ 10.

Point XIV. Section 34A-2-601 grants the ALJ discretion to act without notice to the parties.

WCF fails to recognize adjudicatory discretion under -601(2)(b). WCF.Brief, III. *Cf.*, *e.g.*, *Johnston*, ¶ 15 (abuse of discretion standard applies to Labor Commission), Facts ¶¶ 8-10, *see Worthen*, 926 P.2d at 868-9. The statute is silent on notice, but recognizes discretion in allowing the ALJ for example, to request additional findings. WCF ignores that the statute has taken on additional meaning through case law, including that ALJs must provide interim orders. Resp. Ex. 2 (template letter), 8 (*Process Summary*), 22 (Training Agendas), LaJeunesse R. 1189, *see Price River*, 731 P.2d at

1083-4.

WCF failed to address public policy concerns: that harm could befall a pro-se litigant (who is unable to object to a flawed report which could be admitted into evidence), or conversely a windfall to an insurer or employer, or the inefficiencies that result when flawed reports are returned for objections to be made so the report can then be resubmitted to the panel. *See Concl.Law* ¶ 16, R. 1039 (quotation marks omitted).

Agencies must administer portions of the code. *Belnorth,* 845 P.2d at 268 n.5. ALJs carry out policy making, regulatory and enforcement powers, rights, duties under Title 34. Utah Code Ann. §34A-1-104 (LexisNexis 2011). ALJs are not bound by the usual common law or statutory rules of evidence or by any technical or formal rules or procedure under section 34A-2-802, and the standard of placing merits over procedure when possible applies at the Commission. *See*, *e.g.*, *Kallas v. US Steel.* Legislative intent is determined by using both the plain language and the function within the context of the entire statutory scheme, thus adjudicatory discretion must be included in statutory analysis. *Hertzske*, ¶ 9. The court considered these factors, WCF does not. As the court stated, correcting errors is not specifically written in the statute but the ALJ's interpretation was correct. *Concl.Law*, ¶¶ 6-7. R. 1036-7.

A. WCF erroneously invents a new duty.

WCF, WCF.Brief, III(A), at 21-4, invents a requirement for the medical panel to write a report which conforms to an imaginary form the Division has already prescribed.

WCF seems to assert "form prescribed by the Division of Adjudication" means a template form, (guidelines should be established before the report's completion, WCF.Brief at 22). This notion overlooks that the entire process involves real people and unresolved medical causation issues. On its face, assigning a duty of legal sufficiency to the physicians rather than respecting the panel's role to assist the judge on medical issues (thus leaving legal framework to the ALJs) fails to recognize the panels as adjunct. Facts, ¶ 15, *see*, *e.g.*, La Jeunesse, R. 1201 (report must be in "proper form as required by adjudication"), R. 1256 (medical panel must address remaining medical issues still in dispute). It also overlooks that the report is written to the ALJ under -601(2)(b)(i).

The medical panel's role is limited by law and WCF cannot re-define it. The panel may not act as factfinder, may not base its conclusions on facts not in evidence, generally may not assess the claimant's testimony, *Intermountain Health Care, 839 P.2d* at 846-7, and must assess causation in definitive terms rather than probability. Facts, ¶¶ 51-3, LaJeunesse, R. 1437. The clarifications assured reports were within known legal parameters – this is the "form prescribed by law" that LaJeunesse aimed to achieve. Facts, ¶¶ 43-5, 51, 55.

WCF's grammatical analysis ("prescribed" is a "past participle", therefore form must have been previously prescribed, WCF.Brief at 22) omits the functionality of the statute, the body of case law the ALJs used to assure reports were properly clarified, or how, as a practical matter, such professional opinions of medical panels could possibly

conform to WCF's proposed concept. See also, Cardozo, B, "[i]nsignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him in on every side. . . ." *See Supra*, Point VI, pp. 43-4. WCF's analysis ignores panel role of "adjunct" already developed through case law, ignores the report is written to the ALJ, and ignores the complaints, largely driven by WCF, that LaJeunesse and Hann attempted to address. Facts, ¶¶ 24, 31, 34-7, 48, 55, *see also* court comment, R. 2025.

WCF overlooks the *Process Summary* already in use as a guide when it asserts the Division is "required to set forth clear guidelines prior to the report's completion." WCF.Brief at 22. Facts, ¶¶ 19-20, Resp. Ex. 8, *supra*, Point II(D), pp. 35-6. WCF's guide notion ignores the statutory directive ("and additional findings as the [ALJ] may require[]") of §34A-2-601(2)(b)(ii).

B. WCF incorrectly asserts LaJeunesse could not act for the Division.

WCF asserts that only the "Division of Adjudication," (WCF.Brief, III(A) at 21-4) can decide what having the report in a "form prescribed by the Division of Adjudication" means. What is the Division if it is not the Director and his co-director ALJ Hann especially when they could decide policy? *See* Facts ¶¶ 12-13. Utah Code Ann. §34A-2-202(1)(e) provides the Commission creates the "the Division of Adjudication that shall adjudicate claims." Director LaJeunesse adjudicated claims under his duty to administer the statute. Additionally, the statute does not exclude the Director from interpreting the statute as WCF asserts. LaJeunesse worked within the parameters of a body of case law

developed over decades, the statutes, his role as the Director of the Division and his role as an ALJ. Facts ¶¶ 34-7, 43, *supra*, Point XIV, pp. 51-5.

WCF provides no support for its statement "there is nothing in the text or structure of the Act to suggest the ALJ has discretion to police the form of the medical report[]", in light of statutory language allowing the ALJ to request additional findings or assure proper form (-601)(2)(b)(i), (ii)). WCF simply disagrees with the meaning of proper form as understood by La Jeunesse, Hann, Hayashi and the court. WCF's creativity is unfounded and not helpful to this Court's analysis.

WCF's reliance on practice as controlling is without merit. *Johnston*, ¶ 22, Facts ¶ 54, See *supra* Point II(A), pp. 32-3.

Point XV. Changes to the reports were not substantive. WCF.Brief, III(B).

WCF oversteps its bounds in going beyond its permission to brief on the function of panels and interpretation and requirements of §34A-2-601.

Additionally, WCF is incorrect. The Commission, Facts, ¶¶ 58, 73, and Audit, Facts, ¶ 50, found there were no substantive changes in four cases. Resp. Ex. 75. LaJeunesse also testified about the lack of substantive changes, so did Drs. Rosen, R. 2041-2, and Thomas, R. 2125, and Acosta. Facts, ¶¶ 7, 50-3, 61, 77.

WCF erroneously believes the panels are independent when they are adjunct, Facts ¶ 15, and misunderstands the legal responsibilities of the ALJs. WCF.Brief at 25, Facts, ¶¶ 43-45. WCF ignores ALJ responsibility to train the panels, Facts, ¶¶ 19, 27-29,

33-4, as well as the problems LaJeunesse attempted to address. Facts ¶¶ 27-32, 34, 37, 44-5.

WCF's reliance on *Plumb v. State of Utah*, 809 P.2d 734, 743 (Utah 1990) is misplaced. In *Plumb*, this Court found it was error to adopt the findings of the special master after learning the parties had no notice that the special master was to review the reasonableness of attorney fees – the exact opposite of what happened here – Hann did not adopt the reports because they were legally flawed. *Id*. Additionally, parties received template letters indicating what the panels were to address. Facts, ¶ 22.

In referencing Hayashi's characterization, whether report should be in Word® or WordPerfect® and whether panel should include certain medical information as substantive, WCF misstates her testimony. WCF.Brief, III(B) at 26. Hayashi only characterized the latter as possibly substantive, R. 1812. Not only is it clear from Hayashi's testimony she had no idea the question pertained to subsection (2)(b), but the question posed, and thus Hayashi's response, had no reference to the specific clarifications requested, as WCF erroneously suggests. Facts, ¶ 50.

Point XVI. WCF improperly selects convenient definitions. WCF.Brief, IV.

WCF's reliance on dictionary definitions, WCF.Brief at 12-3, fails to account for administering the statute, *Belnorth,* 845 P.2d at 268 n.5, which requires the report to be in form prescribed . . . under subsection -601(2)(b) prior to its "prompt distribution" under subsection -601(2)(d), and that reading the statute in the order it is written is a legitimate

form of statutory interpretation; and it also ignores the plain language of the statute. *Esquivel,* ¶ 24, LaJeunesse, R. 1518, 1566-7. Dictionary definitions "will often fail to dictate 'what meaning a word *must* bear in a particular context.'" *Hi-Country Prop. Rights*, ¶¶ 17-19 (citations omitted).

WCF's reliance on dictionary definitions is selective, and perhaps arbitrary. WCF.Brief at 12-13, 25, 27-29. For example, *Black's Law Dictionary*, (5th ed. 1979) defines "prompt delivery" as "[d]elivery as soon as possible, all things considered[,]" and, under "promptly" states that "[t]he meaning . . . depends largely on the facts. . . , for what is 'prompt' in one situation may not be considered such under other circumstances or conditions." Thus definitions contrary to WCF's selections are readily available and equally persuasive in support of LaJeunesse. In any event, the statute states "promptly" not "immediately" and WCF cannot re-write the statute. WCF urges this Court to find that "promptly" means "immediately" under -601(2)(d), but the statute does not state "immediately." WCF "may not rewrite the statute by interpreting it to read as it feels it should have been written." *See e.g.*, *Belnorth,* 845 P.2d at 271.

Additionally, the plain language states that reports are written "to" the judges, who are not mere conduits. WCF does not analyze why the reports are written to the judges.

This Court should consider the Commissioner's acceptance that Hann's intent was to ensure the medical panel reports were finalized "in proper form under Section 601(2)(b)." Hayashi, R. 1880, Resp. Ex. 59, Bates 190.

The concept of seeking clarifications, (*see* WCF.Brief at 22, "statute is silent about propounding further questions. . . .") is reasonably subsumed in the broader authority of (2)(b) to seek additional findings, and therefore consistent with the court's ruling. For example, the "'narrower issue of legal causation' is properly determined by the ALJ through 'an analysis of the facts surrounding the injury and analysis of the connection between the subsequent injury and the original compensable industrial injury.'" *Washington Co. School Dist. v. Labor Comm'n*, 2013 UT App 205, ¶ 42, 309 P.3d 299 (citations omitted). Seeking clarifications reasonably falls within bounds of ALJ authority.

WCF ignores that panels are "adjunct" to the ALJs. Facts, ¶ 15. No witness refuted that communication between the panels and the ALJs was known and expected. Under the concept of open communication, it seems a "distinction without a difference" that Hann reviewed written reports and requested clarifications rather than verbally discussing the same matters; or reviewing draft reports, as doctors had requested of LaJeunesse.

Determination of benefits relies "heavily upon the Commission's expertise in and familiarity with the work environment[,]" traits LaJeunesse exemplified. *Price River*, 731 P.2d at 1084. WCF fails to consider the ALJs' known and expected expertise.

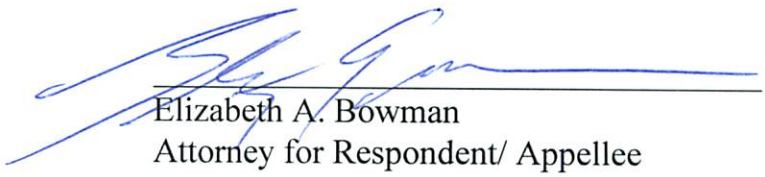
WCF's arguments are unfounded or inapplicable to the facts of the case.

CONCLUSION

The decision of the district court to dismiss the case should be affirmed.

Respectfully submitted this 13th day of April, 2017.

LAW OFFICE OF ELIZABETH BOWMAN, PLLC



Elizabeth A. Bowman
Attorney for Respondent/ Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2017, I caused to be hand-delivered a true and correct copy of the foregoing: **APPELLEE LaJEUNESSE'S APPEAL BRIEF** to counsel of record as follows:

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CERTIFICATE OF COMPLIANCE

I hereby certify under Utah R. App. P. 24(f)(1)(C) that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A). WordPerfect® processing system, used to prepare the brief, indicates there are 13,774 words excluding parts of the brief exempted under Utah R. App. P. 24(f)(1)(B).

Elizabeth A. Bowman
Attorney for Appellee LaJeunesse.

Addendum
Exhibit 1

District Court *Findings of Fact and Conclusions of Law*

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE DEPARTMENT, SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of :	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Richard La Jeunesse, Bar No. 7408,	
Respondent.	Case No. 130905706
	Judge Andrew Stone

This case concerns attorney discipline. The Office of Professional Conduct ("OPC") seeks findings that Respondent Richard La Jeunesse ("La Jeunesse") violated Rule 8.4(D) of Utah's Rules of Professional Conduct by engaging "in conduct that is prejudicial to the administration of justice." A bench trial was held February 22 through 26, 2016 and the Court now enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

Unless otherwise noted, the Court finds the following facts to have been shown by a preponderance of the evidence:

1. La Jeunesse is an attorney licensed to practice law in the state of Utah.

2. La Jeunesse has been a member of the Utah Bar since 1996.

3. He began his career as a hearing officer at the Labor Commission in 1995, becoming an administrative law judge ("ALJ") in 2000. He became the Director

of the Commission's Adjudication Division in 2001, and held that position continuously until 2012.

4. As Director, La Jeunesse supervised other ALJs in the division, including Debbie Hann ("Hann").

5. The ALJs in the division hear contested claims for workers' compensation.

6. In many such cases, the ALJ appoints a medical panel to advise the ALJ regarding the contested medical issues in the case.

7. Typically, a workers' compensation claimant has a treating or other physician who renders an opinion as to the origin and compensability of the claimed injury.

8. The respondent in a contested workers' compensation case (an employer or insurer) typically hires a physician as well, who may render a competing opinion regarding the injury. This is often rendered after an independent medical examination ("IME"), during which the defense physician performs an examination of the claimant.

9. The ALJ may refer the medical aspects of the case to a medical panel. Utah Code 34A-2-601. Such referral is discretionary. *Intermountain Health Care, Inc. v. Bd. of Review of Indus. Comm'n of Utah*, 839 P.2d 841, 845 (Utah Ct. App. 1992) states:

> The function of the medical panel is to give the Commission "the benefit of its diagnosis relating to those matters that are particularly within the scope of its expertise." *IGA Food Fair v. Martin*, 584 P.2d 828, 830 (Utah 1978). However, "the final responsibility of making the decision as to the issues in such a proceeding is given to the Commission," id., and the medical panel may not take over this responsibility of the Commission. Id. at 830 n. 4. Accord, *Jensen v. United States Fuel Co.*, 424 P.2d 440, 442 (Utah 1967). Thus, the role of the medical panel is only "to assist the administrative law judge in deciding whether medical cause has been proven." *Price River Coal Co. v. Industrial Comm'n*, 731 P.2d 1079, 1084 (Utah 1986) (emphasis added).

Id. 839 P.2d at 845 (footnotes omitted).

10. Medical panels are considered "adjunct" to the ALJ at the commission level. La Jeunesse introduced commission decisions, by multiple labor commissioners, stating as much.

11. Prior to referring a case to a medical panel, the ALJ makes interim findings. The medical panel is bound by those factual findings:

> It is not the role of the medical panel to resolve conflicts in the factual evidence regarding the injured party's activities. . . . the Code places that responsibility solely on the Commission. . . . the medical panel is only to take the facts as found by the administrative law judge and consider them in light of its medical expertise to assist the administrative law judge in deciding whether medical cause has been proven. The medical panel strays beyond its province when it attempts to resolve factual disputes, and the administrative law judge improperly abdicates his function if he permits the panel to so act.

Price River Coal Co. v. Indus. Comm'n of Utah, 731 P.2d 1079, 1084 (Utah 1986).

12. Contrastingly, the ALJ is not required to accept the medical panel's conclusions if "substantial conflicting evidence in the case supports a contrary finding." Utah Code § 34A-2-601.

13. The statute provides that the medical panel shall make :
    i. A report in writing to the administrative law judge in a form prescribed by the Division of Adjudication; and
    ii. Additional findings as the administrative law judge may require.

Utah Code § 34A-2-601(2)(b).

14. The statute also provides that

> An administrative law judge shall promptly distribute full copies of a report submitted to the administrative law judge under this Subsection (2) by mail to
>
> A) the applicant

B) the employer
C) the employer's insurance carrier; and
D) an attorney employed by [the above]

Utah Code § 34A-2-601(2)(d).

15. Once the medical panel report is sent to the parties, the parties have 20 days to file objections to the report. If no objections are made, the report is "considered admitted in evidence." Utah Code §34A-2-601(d)(iii). If objections are made the ALJ may set a hearing. In practice, such hearings are almost never held. The ALJ ordinarily rules on the objections and decides what portions of the report to admit and rely on.

16. Medical panels are compensated by the commission.

17. Recruitment and training of the medical panels is the responsibility of the Director of Adjudication (at all relevant times here, La Jeunesse).

18. The quality of medical reports provided by the medical panels to the ALJs has long been a source of complaint among practitioners before the labor commission and the ALJs.

19. Typical complaints regarding the panel reports are that they assume facts beyond or contrary to the interim findings, or that opinions are phrased in terms of percentages instead of legally required conclusions.

20. Training was offered to the medical panel participants on an approximately annual basis. In addition, La Jeunesse would attempt to provide training to individual physicians as they came on.

21. It was not uncommon for ALJs to discuss cases pending before medical panels with members of those panels. The form referral letter invited such correspondence. It was common at annual training sessions for doctors to raise questions regarding pending cases.

22. Complaints about the medical panel reports became particularly intense in late 2011.

23. In January 2012, La Jeunesse discussed with Hann whether the statute permitted the ALJ to reject a report and request changes to its form in order to comply with the legal requirements applicable to medical reports.

24. La Jeunesse testified that he reached the conclusion that such a determination lay within the ALJ's discretion, and agreed with ALJ Hann that she could do so.

25. The Court finds that La Jeunesse had a good faith belief that his statutory interpretation permitting the return of a signed report to a medical panel for technical revision was correct.

26. La Jeunesse's purpose in permitting the return of the medical reports was to correct errors of law or phrasing contained in the reports and to train the physicians who had prepared them. He had no purpose to substantively change the medical opinion or the underlying result in any of the cases.

27. Hann used this "discretion" in five cases between January and June of 2012.

28. La Jeunesse knew of three of these instances.

29. The commission determined, and the Court finds, that there was "no basis to believe" that Hann or La Jeunesse had attempted "to influence the panels' opinions or change the substance of their reports." "Instead," the commission concluded, they "were motivated by a desire to have the medical panels clarify their conclusions."

30. All of La Jeunesse's actions were taken as part of his duties as an ALJ and Director of the Adjudication Division.

31. In at least two of these cases, Hann shredded the initial report sent by the medical panel.

32. No evidence was offered that La Jeunesse knew of the shredding until after the practice of returning medical reports for changes was publicly known.

33. The database tracking the receipt of medical reports was altered to delete reference to the report being delivered to the ALJ to show that the report was again with the medical panel. The system retained a notation of the original delivery of the report and contained notes stating that the original had been shredded in at least two instances. However, no evidence was offered suggesting that La Jeunesse had anything to do, directly or indirectly, with these database entries.

34. In one of the three cases La Jeunesse knew about, Swenson v. Modern Display, La Jeunesse was on the phone with the medical panel chair when the changes were discussed. The proposed report recommended a treatment protocol under certain medical standards. These standards were not universally accepted in the medical community and had not been adopted by the labor commission. La Jeunesse explained to Dr. Holmes (the medical panel chair) that the commission could not require specific standards without rulemaking. He told the doctor he needed to clarify that the standards were not binding on treating physicians. Dr. Holmes agreed to change the report, and offered to bring an amended report in personally.

35. In another of the three cases La Jeunesse knew of, the Boyt case, Dr. Rosen had used language concerning causation indicating "possible but highly unlikely" for a theory ascribed less than a 2% probability. At Hann's request, he changed his opinion of causation to a simple "no" rather than using the qualified language. Dr. Rosen did not feel the change altered the intent of his original answers to the questions posed to the panel.

36. In the Doherik case (the third case known to La Jeunesse), Dr. Rosen discussed alternative factual versions of the fall at issue. The ALJ had already made findings regarding those facts, and Dr. Rosen deleted that discussion. He shortened other answers from more qualified answers to simple "no"s in other

answers. Rosen testified that, as in the Boyt case, he did not feel the requested changes altered the panel's medical opinions.

37. No testimony was offered by any witness suggesting that the changes in these three cases did not address legitimate concerns over the legal form of the reports. No testimony was offered that any of the medical opinions in the reports were substantively altered as a result of the contact from Hann or (in the Swenson case) La Jeunesse.

38. On June 5, 2012, Dori Petersen, a private practitioner at Blackburn and Stoll, called the commission to inquire about an overdue medical panel report. She was told that Hann had received the report from Dr. Rosen and rejected it, sending it back to the medical panel for correction. According to Petersen "If it were anyone but Judge Hann, I probably wouldn't think much about this, but it's Judge Hann. The medical panel is enough of a wild card without Judge Hann instructing them on how to prepare their report."

39. Petersen relayed these facts to other members of the bar practicing at the Workers' Compensation Fund ("WCF").

40. Petersen also called Alan Hennebold, a senior attorney at the Commission to ask about the practice. He informed Petersen that the medical report had been shredded.

41. Hennebold met with La Jeunesse on June 5, and directed him that parties should be copied on any rejections or instructions to medical panel reports. His opinion at the time was that "while Judge Hann's actions may have been entirely appropriate, the lack of transparency is inappropriate."

42. Hennebold instructed La Jeunesse to inform all ALJs of this directive.

43. Later, Sherri Hayashi, Labor Commissioner, instructed La Jeunesse to amend existing policy to make clear that panel reports that were flawed would be sent to the parties.

44. Hayashi requested an independent audit to determine the extent of the practice.

45. The audit identified five cases in which medical reports were sent pack to panels without notice to the parties.

46. The original report was recovered in four of the five total cases and in all three of the cases known to La Jeunesse.

47. Hayashi placed La Jeunesse on administrative leave on June 13, 2012, based on the actions described above.

48. Hayashi terminated La Jeunesse from his position as Director of the Adjudication Division and ALJ on July 10, 2012. The termination was based on his "failure to insist on open and transparent processes" involving the medical panel reports.

49. Hayashi testified that the problem, in her view, was not the decision to return the reports for correction to the medical panels, but rather the failure to inform the parties of that decision and the nature of the changes requested.

50. None of the three cases La Jeunesse knew about was appealed.

51. In at least two of the affected cases, new medical panels were convened. No evidence was offered of any change in the result.

52. On August 14, 2012, WCF filed bar complaints against Hann and La Jeunesse.

53. On August 15, WCF moved to recuse Hann from all of its cases. The motion to recuse attached a copy of the bar complaint. The motion was served on the new Director of the Adjudication Division. It was not served on any of the parties to the cases affected.

54. The Motion to recuse was granted in two days, again no notice was provided prior to this decision to the other parties in the affected cases.

55. No ALJ other than Hann engaged in the practice of rejecting signed medical reports and requesting changes without notice to the parties in the affected case.

56. No written policy of the Labor Commission or Adjudication division expressly forbade returning the medical panel report to the medical panel. OPC attempted to introduce an exhibit which, they proffered, established such a policy. OPC acknowledged that this document was in its position prior to the date of initial disclosures and did not demonstrate that it had been produced in initial disclosures. OPC argued that, because it had received the document from La Jeunesse's prior counsel, La Jeunesse suffered no harm from this failure to disclose. La Jeunesse maintained that he did not know where the proffered document had been obtained, knew nothing of its history, and had prepared relying on OPC's initial disclosures omitting it. Based on this, the Court concluded the document had not been timely disclosed and the failure to disclose was not shown to be harmless, and therefore excluded the document.

57. It appears that La Jeunesse drafted a policy, prior to the events in question, including the language "Once the ALJ receives the panel report, it is mailed to the petitioner and attorneys." It was not clear to what extent this earlier written policy was distributed or effected within the Commission. La Jeunesse used the earlier policy when asked to revise it in response to the events at issue, but it does not appear to have been widely known—La Jeunesse found it because he recalled working on it previously.

58. No evidence showed that La Jeunesse knew of the destruction of medical reports after changes to them were requested until after the matter came to light within the commission. At best, La Jeunesse testified that this was unsurprising, given the decision to request changes and the confidential nature of the medical information discussed in the reports. After the fact, La Jeunesse did not take issue with this destruction for that reason.

59. No evidence showed that La Jeunesse altered any database or instructed anyone to do so. No evidence showed he agreed to any proposal to alter any database or authorized such action.

60. No person actually testified that he or she lost faith in the administration of justice as a result of these actions. Various witnesses speculated as to other parties' reactions to them.

61. The events drew unfavorable media attention.

Conclusions of Law

1. At the close of OPC's case, the Court granted a motion to dismiss in part. The Court concluded that the evidence did not support a finding that La Jeunesse knew of or authorized either 1) the destruction of medical panel reports when first received; or 2) any alteration of the Commission's databases.

2. The parties initially phrased their arguments in this case as whether La Jeunesse and other ALJs are obligated under the statute, upon receipt, to forward the medical panel's report as received to the parties. La Jeunesse points to subsection 2(b) of the statute providing that reports are to be made "in a form prescribed by the Division" and also address "additional findings as the administrative law judge may require." OPC points to subsection 2(d), which provides that "an administrative law judge shall promptly distribute full copies of a report submitted to the administrative law judge" to the parties.

3. Throughout the case, the parties presented competing views of the medical panels. OPC and its witnesses (representatives of the defense bar and the Commissioner) attempted to portray the medical panels as "independent" arbiters. Testimony to the effect that medical panel opinions are generally accepted by the ALJ and the Commission, and thus dispositive, perhaps

explained this perception. La Jeunesse emphasizes that medical panels, though impartial, only serve to advise the ALJ.

4. The Court concludes that the La Jeunesse's view is correct. The word "independent" does not appear in §34A-2-601. Medical panels make no "findings" in the legal sense. *Intermountain Health Care, Inc. v. Bd. of Review of Indus. Comm'n of Utah*, 839 P.2d 841, 847 n.7 (Utah Ct. App. 1992). They are "adjuncts" to the ALJ, and their purpose is to assist the ALJ in making his or her findings. The ALJ, also an impartial neutral, is free to accept the panel's report or, if there is substantial conflicting evidence, find to the contrary.

5. The structure of the statute is also informative. It expressly requires that the report is made by the panel to the ALJ, and the ALJ, after the report is submitted, must promptly mail it to the parties. Neither "submitted" nor "promptly" is defined. This may seem like a close parse of the statute, but the Court presumes there is some reason for requiring that the ALJ receive the panel report in advance of the parties. The Court also notes that "promptly" does not mean "forthwith" or "immediately" and also presumes the Legislature used this milder, more flexible term advisedly. The Court does not believe that the Legislature intended that, upon receipt of a flawed report, the ALJ has no option but to mail it to the parties and await objections. A report may fail to answer the propounded questions. It may rely on facts contrary to the ALJ's findings. It may use language that, though medically appropriate, is legally wrong. Under the reading advanced by OPC, such flawed reports would necessitate a round of objections, after which, according to the OPC, the ALJ could then request clarification or amendment, or refer to another panel.

6. OPC's reading of the statute, that clarification requests are permitted after an original report is mailed to the parties, has no more support in the statutory language than the reading advanced by La Jeunesse allowing a report to be returned to the medical panel before distribution to the parties. Once mailed to the parties, an objection process starts. Absent objection, the report is admitted into evidence. This would be true even if the ALJ, as the fact finder, determined that the report failed to answer the proper questions using the correct

assumptions. Even after objections, the statute is silent about propounding further questions or correcting errors in the report. The statute makes no provision for correction beyond permitting the panel to make "additional findings as the administrative law judge may require." Utah Code §34A-2-601(2)(b). The statute does not specify at what point that might occur.

7. The Court's interpretation of the extent of the ALJ's discretion is further informed by Utah Code §34A-2-802(1), which provides:

> The commission, the commissioner, an administrative law judge, or the Appeals Board, is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules or procedure, other than as provided in this section or as adopted by the commission pursuant to this chapter and Chapter 3, Utah Occupational Disease Act. The commission may make its investigation in such a manner as in its best judgment is calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the chapter.

8. The statute provides for review of the medical panel report by the ALJ prior to mailing to the parties. Given the role of the medical panel as the ALJ's assistant, the statute implicitly permits the ALJ to seek further assistance prior to deeming the report as submitted and mailing it to the interested parties. La Jeunessse did not prejudice the administration of justice by interpreting the statute to grant this discretion to the ALJ.

9. Testimony of existing labor commission policies was unclear. As found above, it appears that La Jeunesse drafted a policy, prior to the events in question, including the language "Once the ALJ receives the panel report, it is mailed to the petitioner and attorneys." It was not clear to what extent this written policy was distributed or effected within the Commission. In any event, it reads too much into this statement to imply a construction of the statute necessarily requiring immediate delivery without review or comment by the ALJ.

10. A more difficult question arises whether or not the ALJ could properly return the report to the medical panel and request corrections without notifying the parties. Commissioner Hayashi viewed this (rather than a failure to immediately send

the report to the parties) as the problem and OPC also emphasized this point in argument.

11. As an initial matter, the evidence is extremely thin as to this conduct as it relates to La Jeunesse. As stated above, there is no evidence that La Jeunesse took any action to conceal the return of the medical panel reports by destroying them or altering any electronic database reflecting their receipt. La Jeunesse, in a discussion with Hann, interpreted the statute to permit the return of the reports to the panel. He also participated in a teleconference discussing changes with Dr. Holmes. La Jeunesse was not assigned to any of the affected cases, and OPC offered no testimony or evidence suggesting that this collateral participation in a case would obligate an ALJ consulted by another ALJ to himself provide notice to the parties. The Court therefore considers whether the La Jeunesse's participation with Hann in the contact with the medical panel was improper by itself.

12. No testimony was offered that contact with medical panels was prohibited. To the contrary, the testimony was that medical panels were invited to contact the assigned ALJ and discussed specific cases under review with ALJs, including at their annual training sessions. Likewise, no testimony was offered of an existing policy (formal or informal) requiring these communications to be disclosed.

13. While ALJs are quasi-judicial, the Code of Judicial Conduct is instructive here. Rule 2.9 of those Rules prohibits most ex parte communications, outside of certain defined parameters. One of those exceptions seem relevant here:

> (A)(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility to personally decide the matter.

14. The issue in this case is not whether better practice would be to inform parties when a medical report is rejected by an ALJ, or other communication is made by

the ALJ with a member of a medical panel. The issue is whether an ALJ commits an ethical or other violation when the ALJ fails to do so.

15. The medical panel is recruited, appointed and paid by the commission to advise the ALJ. As such, they are akin to a "court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities" under Rule 2.9 of the Code of Judicial Conduct. Moreover, the deliberately less formal nature of the administrative process argues even more strongly that ALJ's can appropriately have ex parte contact with persons specifically employed to provide them expertise.

16. The nature of the contacts here illustrates the utility of recognizing this flexibility. When a medical panel fails to follow binding interim findings and the ALJ recognizes that fact in advance, it makes no sense to submit the flawed report to the parties for objections, only to resubmit it to the panel thereafter. A report based on factual assumptions inconsistent with the ALJ's findings is not helpful, and it is inefficient to require parties to make objections to it, or worse yet, to admit it to evidence by default if no objections are made. Likewise, if opinions are hedged with percentages or remote qualifications, the report fails to clearly communicate the actual opinion the panel intends the ALJ to use. If in the ALJ's view the opinion needs to be clarified, there is no purpose served by submitting it to the parties for objections to the obvious.

17. Informing the parties of these corrections may seem laudable and even harmless in theory. It is easy to argue that the more transparency, the better. But that view stems from an improper view of the medical panel as a separate decision maker. As discussed above, it is not. The medical panel functions as an adjunct to the ALJ—analogous to an assistant or clerk. Rule 2.9 of the Code of Judicial Conduct contemplates such communications between judges and employed assistants. It is the same rule that permits a judge to confer with a law clerk or other judges. In the informal atmosphere of administrative decision making, such communications are even more appropriate. Requiring complete transparency may inhibit free communication between the decision maker and his or her assistants. It could also engender additional litigation over report flaws and

ALJ's efforts to correct or clarify them. While the commission is certainly free to restrict its ALJs in such a manner if it chooses to, the statute does not necessarily require such a result.

18. The Court concludes that no existing statute or policy, formal or informal, prohibited communications between a medical panel and ALJs concerning a case under review. No existing statute or policy required the parties to be informed of such contacts.

19. Nevertheless, failure to disclose is potentially problematic. Ex parte communications potentially inform the ALJ's decision, and absent disclosure the parties are unable to address or respond to substantive communications made to the judge.

20. At least one court considering similar circumstances has concluded that such contacts require reversal. *Fremont Indemnity Co. v. Workers' Compensation Appeals Board*, 153 Cal Ap. 3d 965 (Cal. App. 2d Dist. 1984). But the law is far from clear as to the propriety of ex parte contacts with court–appointed experts or consultants. See Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining A Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 Emory L.J. 995, 1029-33 (1994) (discussing apparently widespread contacts by courts with court appointed experts) and John Shepard Wiley, Jr., *Taming Patent: Six Steps for Surviving Scary Patent Cases*, 50 UCLA L. Rev. 1413, 1459-60 (2003) (analogizing technical advisors to law clerks, but acknowledging a lack of appellate authority). At least one California workers' compensation decision refers to a policy that would arguably permit the communications at issue here. *Blackledge v. Bank of America*, 2010 Westlaw 2204836 (Cal W.C.A.B.) (citing WCAB/DWC policy prohibiting ex parte communications by ALJ with disability raters "except to clarify or correct clerical or technical errors or omissions.")

21. La Jeunesse's failure to disclose in these specific cases does not rise to the level of conduct prejudicial to the administration of justice. First, there was no testimony that La Jeunesse authorized or instructed Hann not to disclose the communications. La Jeunesse was not assigned to the cases at issue, so any duty

to disclose would lie with Hann, and not La Jeunesse as another ALJ consulted by her. Second, the specific changes in the cases known of by La Jeunesse were not substantive and the parties were not deprived of a meaningful opportunity to contest them—indeed, there was no evidence that any of the requested changes to the panel reports were inappropriate or altered the panel's medical conclusions. In each of the cases known to La Jeunesse the original report was located and provided to the parties. Third, reasonable legal minds can differ as to whether such communications involving technical corrections to the medical report are necessarily improper, or must be disclosed to the parties. Finally, the preponderance of the evidence showed that the purpose of the communications was to conform the opinions to the appropriate legal framework, and thus avoid non-substantive objections and the delay and expense associated with them.

22. Finally, OPC maintains that a violation of statute or policy is not required to find a violation of Rule 8.4(d). Instead, OPC argues all that is required is 1) conduct and 2) resulting prejudice to the administration of justice.

23. OPC argues that La Jeunesse's authorization and participation in the return of medical reports to medical panels without notice to the parties constituted conduct, and that it resulted in delay and increased costs. That, OPC argues, is enough—the question of severity is reserved for the Court when it determines sanctions.

24. The Court rejects this reading of Rule 8.4. Attorneys and judges interpret laws all the time. On any given day, the Court is confronted by multiple cases involving competing interpretations of law- at least one side is generally wrong. Attorneys and judges take actions or advise others to take actions based on those interpretations. Often, such an interpretation (it matters not whether it is right or wrong, under the OPC's argument here requiring only conduct) causes delay or increased expense.

25. *In re Worthen*, 926 P.2d 853, 868-69 (Utah 1996) is a case in which the Utah Supreme Court interpreted similar language in the Utah Constitution concerning judicial discipline. While the comparison is not entirely apt to this interpretation

of the Rules of Professional Conduct applicable to attorneys, the concerns expressed in that opinion are instructive:

> The offenses that subject a judge to discipline should be defined in such a way as to minimize the potential for overlap between the judicial conduct machinery and the appeal process. For it is worth emphasis that a judge has not behaved improperly simply because he has committed an error. As we noted earlier, the entire appellate process is in place because it is expected that judges will err occasionally, at least in the eyes of the appellate courts. This does not mean that they are not functioning properly as judges, only that they are human beings functioning within a human institution where different people can see things differently. The [disciplinary] process cannot legitimately have as a purpose the punishment of those who commit legal error; rather, it must concern itself only with those who behave outside the ethical norms set for judges, and the constitution and implementing statutes and rules must be so construed.

In re Worthen, at , 868-69.

26. OPC's proposed reading of 8.4 goes too far. By simply examining "conduct" and its asserted effect on the administration of justice, OPC fails to account for legal error, which itself is part of the administration of justice. Ordinary error or differences of opinion are not prejudicial to justice; they are something we expect on the way to truth.

27. In addition, the Court cannot conclude that the actions here necessarily resulted in delay. To answer that question, the Court would have to have evidence sufficient to conclude what delay might have been caused by the reports being submitted without the requested corrections. No testimony or evidence as to that scenario was offered.

28. The Comments to Rule 8.4 also provide guidance as to its proper interpretation:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction

was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Supreme Court Rules of Professional Practice, Rule 8.4 (comment 2), (quoted in Utah State Bar v. Jardine, 2012 UT 67, ¶ 76, 289 P.3d 516, 533).

29. *In re Worthen* is again helpful. In explaining the terms "conduct prejudicial to the administration of justice" in the Utah Constitution, Art. VIII, § 13, the Supreme Court concluded that language also implied some breach of ethical canons:

> Finally, the first clause employs the term "conduct" rather than the term "misconduct" as used in the first ground for judicial discipline, which could, on its face, suggest that the act or acts covered by this ground could be other than a breach of the ethical norms governing judges. However, *concerns about limiting the Commission's jurisdiction to matters of misconduct, not legal error, as well as concerns about vagueness and adequate notice,* lead us to conclude that the term should carry the same definition we gave to "misconduct," i.e., both grounds require "unjudicial conduct," which we defined as a breach of the ethical canons contained in the Code of Judicial Conduct.

In re Worthen, 926 P.2d 853, 870 (Utah 1996)(emphasis added).

30. Similarly, though Rule 8.4 is entitled "Misconduct" and uses that term in other parts of the Rule, Section 8.4 (d) refers to just "conduct." As in *Worthen*, this on its face supports OPC 's argument here. But for the same reasons as articulated in *Worthen*, the Court concludes that Rule 8.4(d) cannot be read to put stricter limits on advocacy than those imposed by existing norms. Certainly, an objectively

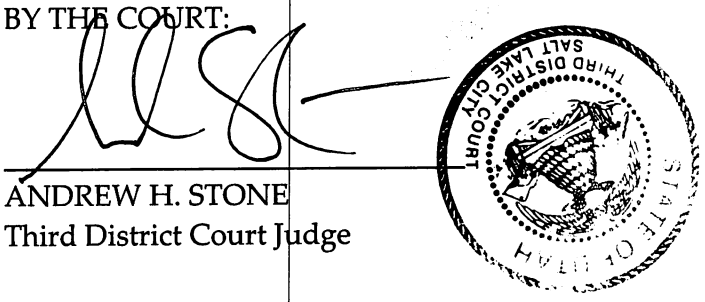
reasonable position taken in good faith by an ALJ in fulfillment of his or her duties cannot support a claim that the conduct taken as a result is a violation of Rule 8.4(d). The line to be drawn here needs to permit and even encourage acceptable legal advocacy including, in this case, administration of an agency's quasi-judicial process. For that reason, the line to be drawn defining where a Rule 8.4(d) begins should provide some daylight between reasonable interpretations of law on the one hand and ethical violations on the other.

31. As found above, none of La Jeunesse's actions involved any morally questionable motive. This is not a repeated pattern of independent violations but a single change in interpretation affecting five cases. The Court has concluded that the actions were either legally permitted or at least did not violate express statute or policy. More importantly, whether or not the actions were legally correct or even advisable, they were taken pursuant to objectively reasonable legal interpretations. No violation of Rule 8.4(d) has been shown.

32. The petition should be dismissed with prejudice. Counsel for La Jeunesse is directed to prepare an order of dismissal.

DATED this 16th day of March, 2016.

BY THE COURT:



ANDREW H. STONE
Third District Court Judge

Addendum
Exhibit 2

Utah Rules of Professional Conduct Rule 8.4 and Comments

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(Emphasis added).
Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] A violation of paragraph (a) based solely on the lawyer's violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as

adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Addendum
Exhibit 3

Utah Code Ann. § 34A-2-601
(LexisNexis 2011)

Utah Code Ann. § 34A-2-601 (Supp. 2010) (effective in 2012), in entirety:

(1) (a) The Division of Adjudication may refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge:

(i) upon the filing of a claim for compensation arising out of and in the course of employment for:
(A) disability by accident; or
(B) death by accident; and
(ii) if the employer or the employer's insurance carrier denies liability.

(b) An administrative law judge may appoint a medical panel upon the filing of a claim for compensation based upon disability or death due to an occupational disease.

(c) A medical panel appointed under this section shall consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim.

(d) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the division may employ a medical director or one or more medical consultants:

(i) on a full-time or part-time basis; and
(ii) for the purpose of:
(A) evaluating medical evidence; and
(B) advising an administrative law judge with respect to the administrative law judge's ultimate fact-finding responsibility.

(e) If all parties agree to the use of a medical director or one or more medical consultants, the medical director or one or more medical consultants is allowed to function in the same manner and under the same procedures as required of a medical panel.

(2) (a) A medical panel, medical director, or medical consultant may do the following to the extent the medical panel, medical director, or medical consultant determines that it is necessary or desirable:

(i) conduct a study;
(ii) take an x-ray;
(iii) perform a test; or
(iv) if authorized by an administrative law judge, conduct a post-mortem

examination.

(b) A medical panel, medical director, or medical consultant shall make:

(i) a report in writing to the administrative law judge in a form prescribed by the Division of Adjudication; and

(ii) additional findings as the administrative law judge may require.

(c) In an occupational disease case, in addition to the requirements of Subsection (2)(b), a medical panel, medical director, or medical consultant shall certify to the administrative law judge:

(i) the extent, if any, of the disability of the claimant from performing work for remuneration or profit;

(ii) whether the sole cause of the disability or death, in the opinion of the medical panel, medical director, or medical consultant results from the occupational disease; and

(iii) (A) whether any other cause aggravated, prolonged, accelerated, or in any way contributed to the disability or death; and

(B) if another cause contributed to the disability or death, the extent in percentage to which the other cause contributed to the disability or death.

(d) (i) An administrative law judge shall promptly distribute full copies of a report submitted to the administrative law judge under this Subsection (2) by mail to:

(A) the applicant;

(B) the employer;

(C) the employer's insurance carrier; and

(D) an attorney employed by a person listed in Subsections (2)(d)(i)(A) through (C).

(ii) Within 20 days after the report described in Subsection (2)(d)(i) is deposited in the United States post office, the following may file with the administrative law judge a written objection to the report:

(A) the applicant;

(B) the employer; or

(C) the employer's insurance carrier.

(iii) If no written objection is filed within the period described in Subsection (2)(d)(ii), the report is considered admitted in evidence.

(e) (i) An administrative law judge may base the administrative law judge's finding and decision on the report of:

(A) a medical panel;
(B) the medical director; or
(C) one or more medical consultants.

(ii) Notwithstanding Subsection (2)(e)(i), an administrative law judge is not bound by a report described in Subsection (2)(e)(i) if other substantial conflicting evidence in the case supports a contrary finding.

(f) (i) If a written objection to a report is filed under Subsection (2)(d), the administrative law judge may set the case for hearing to determine the facts and issues involved.

(ii) At a hearing held pursuant to this Subsection (2)(f), any party may request the administrative law judge to have any of the following present at the hearing for examination and cross-examination:

(A) the chair of the medical panel;
(B) the medical director; or
(C) the one or more medical consultants.

(iii) For good cause shown, an administrative law judge may order the following to be present at the hearing for examination and cross-examination:

(A) a member of a medical panel, with or without the chair of the medical panel;
(B) the medical director; or
(C) a medical consultant.

(g) (i) A written report of a medical panel, medical director, or one or more medical consultants may be received as an exhibit at a hearing described in Subsection (2)(f).

(ii) Notwithstanding Subsection (2)(g)(i), a report received as an exhibit under Subsection (2)(g)(i) may not be considered as evidence in the case except as far as the report is sustained by the testimony admitted.

(h) For a claim referred under Subsection (1) to a medical panel, medical director, or medical consultant before July 1, 1997, the commission shall pay out of the Employers' Reinsurance Fund established in Section 34A-2-702:

(i) expenses of a study or report of the medical panel, medical director, or medical consultant; and
(ii) the expenses of the medical panel's, medical director's, or medical consultant's appearance before an administrative law judge.

(i) (i) For a claim referred under Subsection (1) to a medical panel, medical director, or medical consultant on or after July 1, 1997, the commission shall pay out of the Uninsured Employers' Fund established in Section 34A-2-704 the expenses of:

(A) a study or report of the medical panel, medical director, or medical consultant; and
(B) the medical panel's, medical director's, or medical consultant's appearance before an administrative law judge.

(ii) Notwithstanding Section 34A-2-704, the expenses described in Subsection (2)(i)(i) shall be paid from the Uninsured Employers' Fund whether or not the employment relationship during which the industrial accident or occupational disease occurred is localized in Utah as described in Subsection 34A-2-704(20).

Utah Code Ann. 34A-2-601 (2011) (emphasis added).

Addendum
Exhibit 4

In re Discipline of Debbie Hann, Bar No. 5077,
District Court Case No. 130905705,
Ruling and Order Granting Stay

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE DISCIPLINE OF: DEBBIE L. HANN, BAR NO. 5077, Respondent.	**RULING AND ORDER** Case No. 130905705 Judge Katie Bernards-Goodman

Before the court is Respondent Debbie L. Hann's Motion to Stay pending the outcome on appeal of the companion case *In re Discipline of Richard M. La Jeunesse, Bar No. 7408*, case no. 130905706. The standard for staying a case rests in the inherent power of the Court and the grounds for granting a stay vary according to the requirements of each individual case. *Lewis v. Moultree*, 627 P.2d 94, 96 (Utah 1981). One common ground for granting a stay is the pendency of another action involving identical parties and issues and where a decision in one action settles the issues in another. *Id.* Respondent urges the Court to stay the current case because the same statutes and policies underlie both this and the *La Jeunesse* case and it would be in the best interest of judicial economy to receive final word from the Utah Supreme Court on the law before proceeding in this action.

In *La Jeunesse*, Judge Stone resolved the issue of whether "an ALJ commits an ethical or other violation when the ALJ fails [to inform parties when a medical report is rejected by an ALJ]." Findings of Fact and Conclusions of Law, ¶ 14, *In re Discipline of Richard La Jeunesse, Bar No. 7408*, case no. 130905706 (March 16, 2016). Judge Stone concluded that "the statute implicitly permits the ALJ to seek further assistance prior to deeming the report as submitted and mailing it to the interested parties." *Id.* ¶ 8. Furthermore, Judge Stone explained that "[n]o existing statute or policy required the parties to be informed of such contacts." *Id.* ¶ 18. Judge Stone then evaluated La Jeunesse's conduct and concluded it neither violated an express statute or policy nor ran afoul of Rule 8.4 of the Rules of Professional Conduct. Judge Stone ordered the case dismissed and appeal was taken by the Office of Professional Conduct ("OPC").

In the case before this Court, Respondent is accused of violating her professional duty by failing to disclose her contacts with the medical panels regarding insufficient reports and by

shredding or otherwise not retaining copies of the reports resulting in prejudice to the administration of justice. Underlying these actions are the same statute and ALJ policy at issue in *La Jeunesse*. Although the conduct differs, the legal interpretation of the statute and the ALJ policy is the same. The Court finds it is in the best interest of judicial economy to wait for the final legal determination from the Utah Supreme Court before applying the law to the facts and conduct at issue in this case.[1] The cases involve identical interpretations of the law and substantially the same parties. Therefore, the Court GRANTS Respondent's Motion to Stay pending resolution of the *La Jeunesse* case on appeal.[2]

This Ruling and Order is the order of the court and no additional order is required to be prepared in this matter.

DATED: May 9, 2016.

THIRD JUDICIAL DISTRICT COURT

Judge Katie Bernards-Goodman

[1] OPC argues that staying the case does not make sense given the Court's previous ruling that the cases could not be consolidated because "the facts and issues of the two cases are different." Memo in Opp. Mot. to Stay at 2, (April 25, 2016). However the Court did not determine that the issues or the underlying law were not the same, just that "[t]here are differences of facts between the two cases." Order (Sept. 14, 2015).

[2] Because the case is stayed, the Court need not reach the issue of collateral estoppel raised by Respondent at this time.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130905705 by the method and on the date specified.

EMAIL: ELIZABETH A BOWMAN eabowman@xmission.com
EMAIL: BARBARA LYNN TOWNSEND opcfiling@utahbar.org

Date: 05/10/2016 /s/ LYNDSAY MARTINEZ

Deputy Court Clerk

Addendum
Exhibit 5

In re Discipline of Debbie Hann, Bar No. 5077,
District Court Case No. 130905705,
Complaint

Barbara L. Townsend, 5568
Assistant Counsel
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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:	**COMPLAINT**
Debbie L. Hann, #5077	**Civil No.** 130905705
Respondent.	**Judge:** Katie Bernards-Goodman

The Utah State Bar's Office of Professional Conduct ("OPC"), by and through Barbara L. Townsend, Assistant Counsel, complains against the Respondent, Debbie L. Hann, as follows:

I
PARTIES

1. Debbie L. Hann is an attorney and administrative law judge licensed to practice law in the State of Utah and a member of the Utah State Bar. Her address according to the records of the Executive Director of the Utah State Bar is Utah Labor Commission, P.O. Box 146615, Salt Lake City, UT 84114-6615.

2. According to Utah State Bar records, Judge Hann has been a member of the Utah State Bar since 1987.

3. This Complaint is brought pursuant to a directive of a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court, and is based upon an Informal Complaint submitted against Judge Hann by Dennis Lloyd.

II
JURISDICTION AND VENUE

4. The OPC received an Informal Complaint from Dennis Lloyd in this matter on August 15, 2012.

5. The OPC served a Notice of Informal Complaint ("NOIC") in the Lloyd matter on Judge Hann on October 31, 2012.

6. A hearing was held in the Lloyd matter before a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court on April 11, 2013.

7. At the conclusion of the hearing on April 11, 2013, the Screening Panel directed the OPC to file a formal Complaint against Judge Hann.

8. Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Rules of Lawyer Discipline and Disability (amended January 1, 2003) ("RLDD").

9. Venue is proper in this Court pursuant to Rule 14-511(b) of the RLDD, in that at all relevant times, Judge Hann practiced law in Salt Lake County.

III
FACTUAL ALLEGATIONS

10. On June 6, 2012, Labor Commissioner, Sherrie Hayashi, learned that Judge Hann as the Administrative Law Judge presiding over a case had contacted a doctor on the metical panel without notifying the parties in the case.

11. Judge Hann rejected a medical report written by the doctor and asked the doctor to change the report and send a new report with the changes.

12. Ms. Hann then destroyed the original medical report sent by the doctor.

13. Ms. Hann also instructed staff to delete the entry regarding the original report from the data base.

14. On June 8, 2012, Eugene C. Miller, Jr., an attorney with the Workers Compensation Fund, received word that on one of his cases, a report written by Dr. Edward Holms had been returned to the doctor by Judge Hann. Judge Hann asked the doctor to prepare a second report in this case.

15. Judge Hann gave the original report back to Dr. Holms.

16. On June 14, 2012, Commissioner Hayashi sent a letter to the Worker's Compensation Stakeholders informing them of the above problem and indicating that reports had been rejected by Judge Hann in three cases. Commissioner Hayashi indicated that immediate action needed to be taken and asked John Pearce of the Governor's Office to do an independent audit. Commissioner Hayashi took immediate corrective action placing Judge Hann on administrative leave.

17. A performance audit was commenced by the Utah Labor Commission.

18. On July 3, 2012, the Audit Report was issued.

19. One of the findings of the audit was that the conduct at issue was limited to Judge Hann and Judge Richard LaJeunesse.

20. The Auditors found that at least one of the medical reports had been shredded.

21. The Auditors found that any notation of the original reports had been deleted from the data base.

22. The Auditors also found that there were two additional cases where Judge Hann had instructed medical panel members to change the information in their reports. In each instance, changes were requested to the medical report and the notation of the receipt of the medical report was deleted from the Commissioner's data base and reentered when the new report came in.

23. The Auditors found that in each of the five cases, no notice had been sent out to the parties that there had been an original report that had been rejected.

24. The Auditors found that in one of the cases, the medical panelist still had the original report and the changes that Judge Hann asked him to make included "considerable differences," from what was written in the original report.

25. The Auditors found that Judge Hann's supervisor, Judge Richard LaJeunesse, met with resistance from one doctor regarding the changes in the reports and that Judge LaJeunesse explained that the changes were necessary.

26. The Auditors recommended that the parties involved in the five cases be notified and that attempts be made to get the original reports; that the Commission establish a policy against questionable communication; and, that the Commission complete an investigation into the conduct of the two administrative law judges.

27. On July 10, 2012, the Utah Labor Commission issued its report finding that the conduct of Judge Hann and Judge LaJeunesse was inappropriate and violated explicit and implicit statutory requirements in the Utah Worker's Compensation Act and the Utah Administrative Procedures Act.

28. On July 18, 2012, Commissioner Hayashi issued a letter titled "Imposition of Discipline - Written Reprimand" to Debbie Hann. Commissioner Hayashi stated that her conduct in (1) requesting changes to medical panel reports without notice to parties, (2) rejecting reports, and (3) destroying reports, when none of these things had been done in other cases was inconsistent with well-established Division practices.

29. Commissioner Hayashi also stated that the improper destruction of reports violated the Commission Code of Conduct's prohibition against wrongful destruction of records; that the conduct resulted in substantial mistrust and doubt in the integrity of the ability of the Commission to fulfill its mission; and, that the conduct harmed the effectiveness of the Commission.

30. According to the audit and commission investigation, Judge Hann's failure to circulate the preliminary medical report to all parties violated Utah Code Ann. § 34A-2-601.

31. According to the audit and commission investigation, Judge Hann's failure to circulate the preliminary medical report to all parties resulted in a probable deprivation of due process of the litigants in the cases at issue.

COUNT ONE

32. Rule 8.4(d) (Misconduct), Rules of Professional Conduct, states: "It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

33. Judge Hann made a knowing decision to send back, and in some cases destroy, original reports without notifying the parties.

34. Judge Hann told staff to delete entries from the record.

35. Judge Hann's violations of the Commission's Code of Conduct and Utah Code Ann. § 34A-2-601 resulted in a probable deprivation of due process of the litigants. Judge Hann's conduct was prejudicial to the administration of justice and violated Rule 8.4(d) (Misconduct), Rules of Professional Conduct.

PRAYER FOR RELIEF

WHEREFORE, the Office of Professional Conduct requests:

1. That the appropriate disciplinary sanction be imposed against Debbie L. Hann;

2. That the Court order Judge Hann to pay the costs of prosecution to the OPC; and

3. For such other relief as the Court deems just.

DATED this 27th day of August 2013.

Barbara L. Townsend
Assistant Counsel
Office of Professional Conduct

DATED this 26th day of August 2013.

Terrie T. McIntosh, Chair
Ethics and Discipline Committee

This pleading filed on behalf of the Utah State Bar, Office of Professional Conduct as directed by the Ethics and Discipline Committee of the Utah Supreme Court:
Utah State Bar—Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111